# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~527~~ 176.

W. A. ARTHUR AND JOHN C. WARE, PARTNERS AS W. A. ARTHUR & CO., PLAINTIFFS IN ERROR,

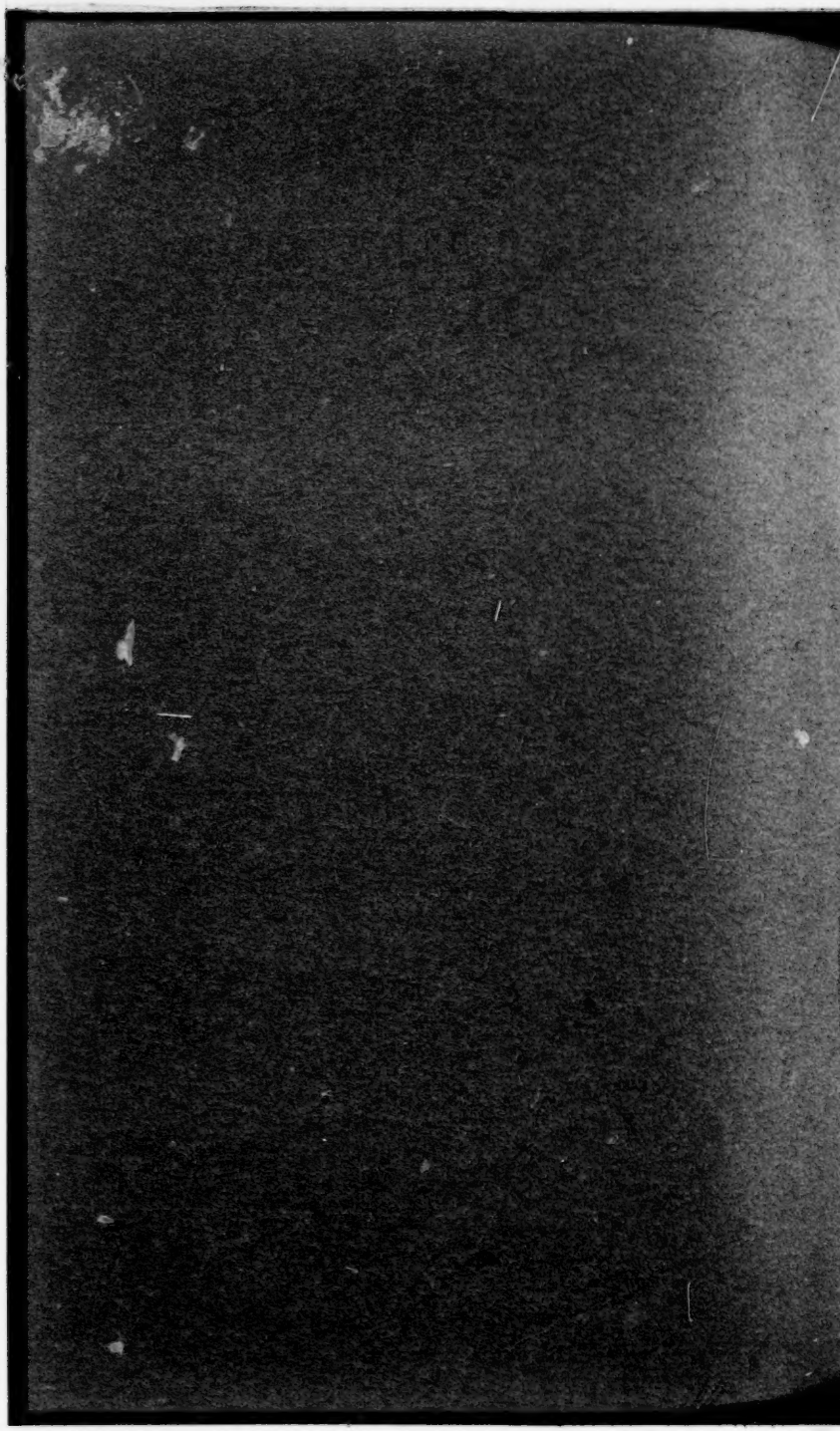
*vs.*

TEXAS AND PACIFIC RAILWAY COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED JANUARY 2, 1906.

(20,029.)



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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1905, of said Court, begun and held at the United States Court House in the City of St. Paul, Minnesota, on the first Monday in May, to-wit: the first day of May, A. D. 1905, before the Honorable Walter H. Sanborn and the Honorable Willis Van Deventer, Circuit Judges, and the Honorable John F. Philips, District Judge.

Attest:

JOHN D. JORDAN,
*Clerk of the United States Circuit Court*
*of Appeals for the Eighth Circuit.*

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Be it remembered that heretofore, to-wit: on the first day of March, A. D. 1904, a transcript of record, pursuant to a writ of error directed to the Circuit Court of the United States for the Western District of Arkansas, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein W. A. Arthur, *et al.*, were Plaintiffs in Error, and the Texas & Pacific Railway Company was Defendant in Error, which said transcript of record is in the words and figures following, to-wit:

a Pleas before the Honorable John H. Rogers, Judge of the United States District Court for the Western District of Arkansas, sitting as Circuit Judge, on the 11th and 12th days of November A. D. 1903 in the United States Circuit Court for said Division and District in a case depending in said Court wherein W. A. Arthur & John C. Ware, partners as W. A. Arthur & Co. are plaintiffs and the Texas & Pacific Railway Company is Defendant.

1 In the Circuit Court of the United States. For the Western District of Arkansas. Texarkana Division.

William. A. Arthur and John C. Ware, partners as W. A. Arthur & Company Plaintiffs

versus

Texas & Pacific Railway Company, Defendant.

[Amended] Complaint at Law.

Now come the above named plaintiffs on leave of the Court asked and obtained, and file the following for their amended and substituted complaint herein. The plaintiffs William A. Arthur and John C. Ware are partners doing business under their style and firm name of W. A. Arthur & Company and complaining of the defendant the Texas & Pacific Railway Company states that said defendant is a corporation duly organized and existing under and by virtue of certain Acts of Congress of the United States to-wit. An Act entitled "An Act to Incorporate the Texas Pacific Railroad Company and to aid in the construction of its road and for other purposes" approved March 3 1871 and Acts amendatory thereof and [supplemantary] thereto, including an Act approved May 2 1872 whereby among other things, the name, style and title of said Texas Pacific Railroad Company was changed to Texas & Pacific Railway Company. Plaintiffs further state that this suit against said defendant is a suit arising under the laws of the United States, and more especially under the laws of the United States constituting the character of said defendant Texas & Pacific Railway Company and under which it was incorporated, that is to say, the said Act of Congress of the United States approved March 3 1871, entitled "An Act to incorporate the said Texas Pacific Railroad Company and to aid in the construction of its road and for other purposes" and acts amendatory thereof and supplementary thereto, approved respectively May 2 1872, March 3 1873 and June 22 1874.

Said defendant Texas & Pacific Railway Company is a resident citizen of the state of Texas and has its domicile and principal place of business in Dallas Texas; but has an agent in Miller County Arkansas, upon whom service of process may be made. Said plaintiffs William A. Arthur and John C. Ware are resident citizens of Miller County Arkansas, and the Western District of Arkansas.

Said Texas & Pacific Railway Co. is a common carrier for hire and as such entered into a contract with the plaintiffs on the 17th day of September 190- to ship from Texarkana Texas to Utica New York, for 85 cents per hundred pounds, to the order of W. A. Arthur & Co., fifty bales of cotton of the value of $2,605.53. A copy of said bill of lading for said cotton is hereto attached, marked "Exhibit A" and made a part of this complaint.

2

That while said defendant had no line of railway owned by it for the transportation of freight from Texarkana to Utica N. Y., said defendant did have traffic arrangements and partnership agreements for all shipment of cotton from Texarkana to Utica and for the division of freight on such shipments with the St. Louis, Iron Mountain & Southern Railway Co., and the connecting carriers intervening between the terminus of said St. Louis, Iron Mountain & Southern Railway Co., at St. Louis and Utica N. Y. by which arrangements said Texas & Pacific Ry. Co. was authorized and empowered by all said carriers, over whose lines said cotton would be shipped, to execute and deliver bill of lading for the shipment of said cotton and was authorized to act as agent for said connecting carriers and quote said rate of freight for the delivery of said cotton and said defendant, by virtue of its said arrangements with said intervening carriers, held itself out to the public and to cotton shippers as a common carrier from Texarkana to Utica N. Y., and so represented itself to be when said 50 bales were tendered to and received by it.

The plaintiffs state that the provision in the bill of lading attached as "Exhibit A" to this complaint exempting the said defendant from loss of cotton by fire was void, because (1) said bill of lading was executed by said plaintiffs under duress; (2) said provision is unreasonable; and (3) was without a consideration. Said freight rates so charged were the regular rates for the shipment of cotton over all lines of railway between Texarkana and Utica, N. Y., and no option was given to said plaintiffs to receive any other form of bill of lading than that exempting said defendant from liability for loss of said cotton by fire, and plaintiffs did not assent thereto. Said Plaintiffs state that said

cotton was destroyed by fire on the platform of the Union Compress Company in Texarkana Texas, where said defendant received it on the 12 day of September 1900.

Plaintiffs further state that immediately after the said cotton was received by the defendant to be shipped to Utica N. Y. said defendant delivered said cotton into the custody of said Union Compress Co., and made said Compress Co. its agent for the purpose of having said cotton compressed for the convenience of the defendant in handling the same; that said Union Compress Company's platforms were not a safe place on which to keep cotton; that said compress platforms were not enclosed and no proper provision was made to prevent the destruction of said cotton by fire; that said Compress Company while
3 so acting as agent for said defendant failed to provide suitable or proper apparatus for putting out fires and failed to keep a proper watch to prevent said cotton from being destroyed by fire. On the 19th of September 1900 while said cotton was exposed to the sparks of passing engines and while the employees of said Union Compress Co., the agent of said defendant, were neglecting to care for said cotton, it caught on fire from sparks from a passing engine and was destroyed, whereby the defendant became liable to the plaintiffs in the sum of $2,605.53, the value of said cotton.

Plaintiffs further state that the matter in dispute in this cause, and the amount sued for, exclusive of interest and costs of suit, exceeds the sum of $2000 and that this suit arises under the laws of the United States as hereinbefore more fully set forth.

Wherefore plaintiffs pray judgment for the sum of $2605.53, for interest, costs of suit and general relief.

W. H. ARNOLD & L. A. ROWLAND,
[Attsy] for Plaintiffs.

Indorsed: No. 222. W. A. Arthur & John C. Ware Partners as W. A. Arthur & Co., Plaintiffs, versus Texas & Pacific Ry Co., Defendant. Amended Complaint. Filed May 21 1903. John M. Somervell, Clerk. W. H. Arnold Attorney.

4 In the United States Circuit Court for the Western District of Arkansas, Texarkana Division.

W. A. Arthur & Co., Plaintiffs,
vs.
Texas & Pacific Railway Company, Defendant.

Amended Answer.

Now comes the above named defendant, the Texas & Pacific Railway Company on leave of the Court asked and ob-

tained, files the following for its amended and substituted answer herein.

I.

The Defendant admits that W. A. Arthur and John C. Ware are partners and compose the firm of W. A. Aethur & Co., plaintiffs and that the Texas & Pacific Railway Company is a corporation organized under the laws of the United States as alleged in plaintiffs' amended complaint, and that it was authorized and empowered to execute said bill of lading and contract for the shipment of cotton described in said complaint from Texarkana Texas to Utica New York. It denies that it was in partnership with any other railroad company and that in said bill of lading and contract it was specially stipulated and agreed that the defendant only bound itself to protect the through rate of freight to-wit eighty five cents per hundred pounds mentioned therein.

II.

The defendant denies that it is or was a partner of the St. L. Iron Mountain & Southern Railway Co, or any other connecting carrier over whose line of road said cotton was intended to be transported. It denies that said bill of lading was executed by plaintiffs under duress. It denies that the provision exempting defendants from liability for fire, or any other provision of said contract, is unreasonable. It denies that said contract, or any provision thereof, was without consideration. It denies that the said freight rates, charged and stipulated for in said contract, was the only freight rate on said cotton from Texarkana Texas to Utica New York. It denies that no option was given to said plaintiffs to ship said cotton without exempting said defendant from liability for less of said cotton by fire. It denies that it acted as agent for the St. Louis, Iron Mountain & Southern Railway Company, or any other carrier, in making the contract set up in plaintiffs' complaint, except in so far as it undertook to guarantee the through rate of freight.

III.

Defendant admits that the said cotton was destroyed by fire while the same was on the platforms of the Union Compress Company in Texarkana Texas, on the 19th day of September A. D. 1900, but it denies that the defendant delivered said cotton into the custody of the said Union Compress Company and denies that it made the said compress company its agent for the purpose of having said cotton compressed for the convenience of the defendant in handling the [sane]; it denies that said Union Compress Company's platforms were not a safe-

place on which to keep said cotton; it denies that proper provision was not made to prevent the destruction of said cotton by fire, or that its whole platform was uninclosed; and it denies that said Union Compress Company failed to provide suitable or proper apparatus for putting out fire or that it failed to keep a proper watch to keep said cotton from being destroyed by fire. It denies that either it or its agents or the Union Compress Company Co neglected to care for said cotton or that the said cotton was destroyed by the negligence of this defendant or of the Union Compress Co.

IV.

Defendant alleges that the Union Compress Co, at the time of said fire was located on the tracks of the defendant and that of two other railroads. That the same was properly built and constructed and a portion of its platform was covered and enclosed. Said Compress and its platforms were constructed and maintained in and after the most approved style and manner of constructing compresses and platforms for compressing, handling and shipping cotton. That the Union Compress Co was provided for with the usual and customary facilities for fighting fire. That the same were such as were used by all other compresses in the country. That said compress kept a sufficient number of men on duty and on watch to prevent the destruction of cotton by fire, and to prevent the destruction of its compress. That the number of men so kept by it to watch cotton stored on its platforms from loss or damage by fire were such as was then kept by all compresses in the country; and that in locating, constructing and maintaining its compress and platforms, the said Union Compress Co adopted, carried out inforced the same rules regulations and procedure for protecting cotton on its platforms from fire that was adopted, enforced and carried out by all other companies in the country. That on the day said cotton was destroyed by fire, there was a high wind blowing from the south with such force
6 and velocity that it spread the fire over the platforms and under the sheds and in the buildings of said compress company with such force and rapidity that it was impossible to check or subdue the same, although the employees of said Compress Company were present and provided with water, hose and buckets, adequate for fighting and subduing ordinary fires and used every effort within their powers to do so.

V.

The Defendant denies that it delivered said cotton to the Union Compress Company but says that the same was delivered to the said Compress Company by the plaintiffs and was

tendered to the defendant on said platforms by the plaintiffs where they had voluntarily placed the same.

VI.

Defendant says that it entered into a contract with the plaintiff to transport said cotton from Texarkana Texas to Utica New York. That said contract was evidenced by a bill of lading in writing between the plaintiffs and the defendant setting forth the terms, stipulations and conditions under which the carrier undertook the transportation of said cotton.

That defendant attaches a copy of said written contract and makes it a part of this answer. That the original contract between the plaintiffs and the defendant is in the possession of the plaintiffs or attached to their amended complaint. That said cotton was received by defendant to be shipped under said bill of lading and written contract which among other things specially stipulated that the liability of the Texas & Pacific Railway Company in respect to said cotton, and under this contract, is limited to its own line of railway, and it shall not be liable for any loss, detriment or damage done to or sustained by said cotton not occurring on its own road, nor after said cotton has been delivered, or is ready for delivery to the next connecting carrier or consignee. Said Contract further expressly stipulated that "neither the Texas & Pacific Railway Company nor any connecting carrier handling said cotton shall be liable for damage to or destruction of said cotton by fire nor for any loss thereof or damage thereto by causes beyond its control", and that each carrier over whose route the cotton is to be carried hereunder shall have the privilege, at its own expense, of compressing the same, for greater convenience in handling and forwarding, and shall not be responsible for deviation or unavoidable delays in procuring said compression. That all stipulations became and were and are a part of the contract and agreement to ship said cotton mentioned in plaintiffs complaint. That while said cotton was on the platforms and in the compress of the Union Compress Company, it was without negligence of the defendant destroyed by fire. That at said time it was not in the possession of
7 nor on the line of the defendant's railroad. That said destruction of said cotton was by causes beyond the defendant's control and defendant specially pleads the above and foregoing stipulations in said contract in bar of Plaintiffs right to recover herein.

VII.

Defendant says that at the time of the execution of said bill of lading and the loss and destruction of said cotton it neither owned nor controlled any line of railway in Arkansas, That

at Texarkana its entire line of railway was in Texas, and said Compress Company, at which the plaintiffs tendered said defendant the said fifty bales of cotton, is located a few hundred yards west of the line between Texas and Arkansas, and that defendant's road extended only to said state line in the direction in which said cotton was to be transported. That said cotton was placed with said Union Compress Company by the plaintiffs and was there tendered to the defendant and the said bill of lading and contract was then and there executed. That under the laws of the state of Texas, where said cotton was then and there situate, and under the rules and regulations of the defendant, which were reasonable, it was then and there the duty of the defendant to give a bill of lading for such cotton when so tendered to it in the manner or on the same terms it would receive and receipt for cotton if tendered at its own depot or platform assigned by it for such transactions, and that under said laws and said rules and regulations when said cotton is so tendered to the defendant upon the platform of the Compress Company where said Compress Company is situated on the tracks of said railroad the shipper assumes the risk of insurance involved by said act of the railway company, and assumes the risk of said cotton being lost by any agency whatever except it be the negligence of the railroad company. That there was an additional risk of said cotton being destroyed by fire by reason of its being on said compress platform and that plaintiffs assented to and assumed that risk by reason of the laws and rules and regulations above referred to, and asssumed the risk of said cotton being destroyed by fire from any and all agency except that of the negligence of the defendant railway Company. That said defendant had no control or management of the Union Compress Company or of its premises, platforms or sheds or of said cotton while on the platform of said compress, and that said cotton was not destroyed by or through any negligence of this defendant. That it was not destroyed by being transported or while the defendant was doing any of the things it had contracted to do nor while it was dealing with said cotton in its capacity as a common carrier.

8 VIII.

That in agreeing to transport said cotton from Texarkana Texas to Utica New York, it had to and it was in the contemplation of the parties to that contract, that said cotton would be transported over the Texas & Pacific Railroad Company to the State line between Texas and Arkansas at Texarkana and there delivered to the St. Louis Iron Mountain & Southern Railway Co. to be transported over its lines to a con-

nection with some other road going in the direction of Utica New York. That said shipment was an interstate one and had to pass over the lines of said railroad companies.

That the stipulations and agreements in said contract were reasonable, were supported by an adequate consideration and were agreed to and accepted by the plaintiffs.

Wherefore defendant says that by reason of all the foregoing premises, it is not liable and asks to be discharged with its costs.

GLASS, ESTES & KING
Attorneys for Defendant.

I, Hiram Glass do solemnly swear that I am one of the attorneys for the defendant Texas & Pacific Railway Company, and that the allegations in the foregoing amended answer are believed by him to be true.

HIRAM GLASS.

Subscribed and sworn to before me this 2nd day of June A. D. 1903.

JOHN M. SOMERVELL,
Clerk U. S. Circuit Court Western District
of Arkansas Texarkana Division.

Exhibit "A" of this answer is identical with bill of lading in John C. Ware's Deposition, page 12.

No. 222. W. A. Arthur & Co. vs. Texas & Pac. Ry. Co. Amended Answer. Filed June 2 1903. John M. Somervell, Clerk. Glass Estes & King, Attorneys for [—]

9 In the United States Circuit Court of the Western District of Arkansas Texarkana Division.

W. A. Arthur & Co.
vs.
Texas & Pacific Ry. Co.

Comes the Texas & Pacific Ry Co., the defendant, and leave of the Court being first obtained filed this its amendment to its amended answer filed herein on June 2, 1903, and in addition to the allegations therein says.

Plaintiffs cotton was by them placed upon the platform of the Union Compress Company and they received from said Compress Company tickets for each bale. That they afterward carried said tickets to the agent of defendant and received in exchange therefor the bill of lading described in this complaint. That during all of this time, both before and after the execution of said bill of lading, said cotton remained in the exclusive

possession of said Compress Company and until the same was destroyed by fire. That said Compress was then and there an independent contractor to whom was referred and intrusted the compression of said cotton before being delivered to the defendant. That it acted independent of defendant in managing, handling and compressing said cotton, and was not under or subject to the control of defendant. That said bill of lading was given for the accommodation of plaintiffs. That said Compress Company was not the agent or servant of the defendant, but in all things acted independent of the defendant.

That said cotton was not in the possession of nor under the control of defendant, before nor at the time of its destruction as aforesaid. That defendant is not chargeable with nor liable for the alleged negligence of the said Compress Company.

Wherefore defendant prays to be discharged.

GLASS, ESTES & KING,
Deft's Attorneys.

No. 222. W. A. Arthur & Co. vs. Texas & Pacific Ry. Co. Amendment to the Answer of the Defendants. Filed Nov. 2, 1903. John M. Somervell, Clerk.

10 In the Circuit Court of the United States for the Western District of Arkansas, Texarkana Division.

W. A. Arthur & Co., Plaintiffs,
vs.
Texas & Pacific Railway Company, Defendant.

Be it Remembered That on this 11 day of November, 1903, a day of the regular term of the November term of the United States Circuit Court for the Western District of Arkansas, Texarkana Division, the above entitled cause came on to be heard before the Hon. John H. Rogers, judge of said court, and among other things the following proceedings were had:

Said cause was submitted to a jury, and the plaintiffs and defendant to maintain the issues upon their respective parts offered and introduced the following testimony, to wit:

11 John C. Ware, one of the plaintiffs, called in his own behalf, being first duly sworn, testified as follows:

Direct Examination

By Mr. Arnold:

Q. Are you the John C. Ware, one of the plaintiffs in this case? A. I am.

Q. State who composes the firm of W. A. Arthur & Co. A. William A. Arthur and John C. Ware.

Q. In what business is your firm engaged? A. Buying and selling cotton.

Q. How long have you been engaged in that business? A. I have been connected with the firm nine or ten years. Mr. Arthur was in the business several years before.

Q. You are suing here for the value of 50 bales of cotton destroyed about the 19th of September, 1900, state what the value of that cotton was. A. I don't remember now. I have it in detail there. (Referring to paper)—about $2600.,—$2605.53. That is the value of the cotton on the day it was destroyed, at the place it was destroyed.

The Court: What date was that?

The Witness: That, I think, was on the 19th of September, 1900. (Referring to paper) Yes sir.

Mr. Arnold: These jurisdictional allegations in regard to the residence of the parties and incorporation &c are not denied.

Q. Did you receive from the Texas & Pacific Railway Co. a bill of lading for these 50 bales of cotton; if so, produce it. A. Yes sir. This (referring to bill of lading) was made out by our office force.

The bill of lading reads as follows:

12 Form 1505.

The Texas and Pacific Railway Company.
Inter-State Cotton Bill of Lading.

Bill of Lading No. D. 6.
T. & P. Contract No.....
....R. R. Contract No....

From Texarkana, Tex.
To Utica, New York.
Route Via All Rail
Gross weight at point of shipment:
Pounds 25358
Through rate per 100 pounds 85c
Total freight $....
Advance charges $....

Received at Texarkana, Tex. from W. A. Arthur & Co. the following property, in apparent good order and well conditioned, except as noted, to wit: Fifty bales of cotton, marked, consigned and destined as indicated below:

Number. Marks.
Fifty Bales Cotton C O T S
50 B/c
(Revenue Stamp)

For delivery unto Order or to their assigns, notify Utica Steam Cotton Mills, Utica New York, upon payment of freight and charges as per margin.

In consideration of the rate of freight herein named, it is hereby stipulated that the service to be performed hereunder shall be subject to the following terms and conditions, and said terms and conditions are hereby agreed to by the shipper, and by him accepted for himself and his assigns as just and reasonable:

Conditions.

1. That the liability of The Texas & Pacific Railway Company in respect to said cotton, and under this contract, is limited to its own line of railway, and it shall not be liable for any loss, detriment or damage done to or sustained by said cotton not occurring on its own road, nor after said cotton has been delivered, or is ready for delivery to the next connecting carrier or consignee.

13 2. That the rate of freight for the transportation of said cotton, specified in the margin hereof, is quoted and guaranteed, with the distinct understanding, and only on condition that the weight of said cotton is truly and correctly represented and stated, and that said rate only includes the charge for transportation, and the specification of said rate shall not be taken as any guide for construction or evidence to extend this contract in other respects, or to bind The Texas & Pacific Railway Company to transport, or to become in anywise responsible for said cotton after delivery thereof to its next connecting carrier, but it shall only bind said company to protect said rate.

3. That neither The Texas & Pacific Railway Company nor any other connecting carrier handling said cotton is bound to carry said property by any particular train or vessel, or in time for any particular market, or otherwise than with as reasonable dispatch as its general business will permit. That neither The Texas & Pacific Railway Company nor any connecting carrier handling said cotton shall be liable for damages to or destruction of said cotton by fire, nor for any loss or depreciation in the weight thereof, nor for any damage or injury thereto caused by water, moisture, decay, dirt, bursting or breaking of bagging or ties, nor in any other damage or injury thereto arising from imperfect baling or compressing, nor for any loss or damage thereto by collision, nor any of the other dangers of navigation or perils of sea while on seas, gulfs, lakes, rivers and canals; nor for any loss thereof or damage thereto by causes beyond its control; or by floods; or by riots, quarantines, strikes or stoppage of labor.

4. That said cotton is subject, at its owner's cost, to the necessary repairs and baling, and the consignees are to pay freight and charges on said cotton in lots or parts of lots as delivered.

5. Each carrier over whose route the cotton is to be carried hereunder shall have the privilege, at its own cost, of compressing same, for greater convenience in handling and forwarding, and shall not be responsible for deviation or unavoidable delays in procuring such compression.

6. That if said cotton, or any part thereof, shall be lost, damaged, or destroyed by means or under circumstances rendering The Texas & Pacific Railway Company, or any connecting carrier, liable therefor, the damages recoverable therefor shall be computed at its value at the time and place of shipment, as evidenced hereby.

7. It is expressly agreed and understood that the recitation in his bill of lading that the cotton was received "in apparent good order and well conditioned" refers only to its external appearance, and if said cotton is found damaged at the point of delivery, the burden of the proof shall be upon the owner of said cotton, or the claimant for damages, to show affirmatively that the cotton was actually in good order and well conditioned when receipted for, it being understood that the carrier only obligates itself to deliver said cotton in like order and condition to the consignee, the unavoidable wear and tear and deterioration in due course of transportation only excepted, as when received by it.

8. This contract is executed and accomplished, and the liability of The Texas & Pacific Railway Company as common carrier under said contract is terminated on the delivery of said cotton to any connecting railroad carrier at the usual place set apart by said carrier for the receipt of cotton, or upon the delivery of said cotton to a steamship company, its master, agent or servants, or when said cotton shall have been unloaded at the wharf or steamship pier, or upon the platform or in the warehouse of The Texas & Pacific Railway Company, and the connecting carrier or consignee duly and reasonably notified thereof.

In

(~~Omitted on account of paper being torn~~) Witness Whereof, The Agent signing on behalf of The Texas & Pacific Railway Company hath affirmed to one bills of lading, all of this tenor and date, one of which bills accomplished being (~~omitted on account of paper being torn~~), the others to stand void.

Dated

(~~Omitted on account of paper being torn~~) at Texarkana, Tex. the 17th day of Sept. 1900.

(Signed) C. P. HOVEY, Agent.

Q. What did you do with it after it was made out? A. The compress receipts, or receipts issued for the cotton by the compress were attached to this form, and presented to the agent of the Texas & Pacific Railway Company, and signed by them on that day—September 17th.

Q. Were the cotton checks issued by the compress for the 50 bales of cotton turned over to the agent of the Texas & Pacific Railway Company at that time? A. Yes sir, they were surrendered to the Railway Company, and they signed the bill of lading, and gave us the bill of lading in lieu of the compress receipts.

The Court: You had delivered the cotton to the compress?

The Witness: They recognized our delivery.

The Court: Actually?

The Witness: Actually delivered it and they gave a receipt for it, and we gave the receipt to the railway agent, who executed a bill of lading for it.

Q. I notice that this cotton was to be shipped to you to New York, to your order? A. Yes sir.

16 Q. State whether you have received this cotton at the point of destination? A. We did not.

Q. What became of it?

[A.] Mr. Glass: We might abbreviate that by saying that it is agreed that the cotton was afterwards destroyed by the fire that destroyed the compress on the 19th of September, 1900.

Q. Do you know what the regular freight rates for the shipment of cotton are from Texarkana, via the Texas & Pacific Railway Company, and via the other roads to Utica, New York? A. Yes sir

Q. What is that rate? A. That rate is 85 cents per 100 pounds, and was at the time of the execution of the bill of lading.

Q. Was there any reduction of rates given to you on account of this shipment? A. No sir, that was the regular tariff rate. I have the tariff, or did at that time, in my office.

Q. Was that the regular published rate? A. Yes sir, the regular published tariff rate.

Q. State whether the Texas & Pacific Railway Company, through any agent, solicited your business with reference to the shipping of cotton to these eastern places previous to this?

Objected to as immaterial; objection overruled; exception for defendant.

A. Shall I answer that in a general way?

Q. Answer the question. A. Yes sir, they solicited it before and since; they have men for that purpose.

17 The Court: That is a different thing; answer it not in reference to what took place before this fire,—before you took this bill of lading?

The defendant excepted to the ruling of the court.

Q. Had you previous to this time given them shipments to the eastern states? A. Yes sir.

Q. Was this done partly in response to their solicitations? A. I could not say that it was,—we have friends among all the railroads, and they solicit our business, and we try to give them all a share of the business, and try to treat them white.

Q. This company had solicited your business before this bill of lading was issued? A. Yes sir.

Q. Can you state to the jury whether the Texas & Pacific Railway Company had any other form of bill of lading for the shipment of cotton except that one given to you in this case? A. Have we special forms for the inter-state shipments,—is that the question?

Q. Yes sir. A. This is the only form. Of course they have export bills of lading, and they are different.

[—] They had also forms for domestic bills of lading? A. Yes.

Q. State whether all those forms have this exemption from liability from loss by fire? A. I think they have,—but that domestic form I have so little to do with that I don't remember.

Q. That is the only form of bill of lading then that the company had to issue for the shipment of cotton to Utica, New York? A. Yes sir.

18 Q. Or to any other point outside of the state of Texas? A. Yes sir, except the foreign bills of lading for export.

Q. On the day that this bill of lading was signed was that cotton at the platform of the Union Compress Company? A. It was.

The Court: That is September 19th?
The Witness: September 17th.
The Court: The bill of lading is September 17th?
The Witness: Yes sir.
Mr. Arnold: The fire was the 19th.

Q. State how long the cotton had been at the compress company's platform before this bill of lading was signed? A. I could not state positively It is likely that the most of that cotton was concentrated there over the line of the T. & P. and delivered at the compress.

Q. You mean to say you had had it shipped there? A. Yes sir.

Q. Why did you have it shipped to the compress company? A. That is the concentrating point and the loading point for Texarkana.

Q. Does the Texas & Pacific Railway Company have any other place in Texarkana to receive and ship this cotton? A. None that I know of.

Q. Then the cotton that you expected to ship by that road would be sent there, and you would have it loaded out from there? A. Yes sir.

Q. There was no other place that you know of to send the cotton to for the purpose of having this company handle it? A. No sir.

19 Q. State whether that was a matter of general knowledge; that where a man wanted to ship cotton he would send it to the compress and would get his bill of lading? A. Yes, sir, I think so, and I know that is the usual rule and the way it always has been since there has been a compress here, and since we have been in business here.

Q. Do you know when this bill of lading was signed that this was the only form that the company here would issue for this cotton? A. Yes sir.

Q. Did you know at that time that you were paying full tariff published rates for the shipment of this cotton? A. Yes sir.

Q. What was the rate to St. Louis? A. The rate to St. Louis,—East St. Louis, I think was 60 cents plus 25 beyond the river, which makes 85 to Utica.

Q. The rate from St. Louis to Utica was 25? A. Yes sir.

Q. From here to St. Louis it was 60? A. Yes sir.

Q. Do you know whether the initial carrier received the greater portion of the rate in shipping? A. I have been told so by freight agents—

Mr. Glass: I object to that.

Objection sustained.

Q. Why did you make no protest against this fire clause in this bill of lading at the time it was sent to be signed by the agent of the railway? A. Because I had at different times,—

Objection.

Mr. Glass. Whether or not he voluntarily entered into this contract,—if he did it makes no difference what his reason was for not protesting. If he accepted this contract volun-

20 tarily it does not make any difference what his reasons for accepting it were.

Objection overruled. Defendants except.

The Witness: Because I had at different times and on different occasions asked that certain small clauses should be eliminated from bills of lading, and had asked the privilege of routing the cotton, and they were all denied me, and therefore I knew it was useless.

Q. You knew it would be a useless request to make to ask for this bill of lading to be changed? A. Yes sir.

Q. As a matter of fact, were these forms furnished to you by the railway company? A. Yes.

Cross-Examination

By Mr. Glass:

Q. You speak about the rate from St. Louis to Utica, New York; you don't mean to say that the regular rate from St. Louis to Utica is 25 cents,—that is the arbitrary rate,—we don't fix the rate from Texarkana to these common tariff points. A. They have a tariff,—it is a joint tariff issued by the roads east of the river, as well as west.

Q. You don't mean to say that if you were in St. Louis and wanted to ship a bale of cotton,—you don't mean to say that the rate is 25 cents? A. No sir, it may have been more. I was going to state the way the rates were formulated.

Q. I didn't ask you that question. The way to get at this rate,—the rate to Utica, New York,—that is in a certain territory, and all towns in that same territory they take that rate from Texas points, don't they? A. I presume so. Utica is a basing point, as well as New York and Boston.

21 Q. You take it to St. Louis and add to that the arbitrary rate of 25 cents. A. That is the through rate.

Q. You get that by adding 25 cents to the St. Louis rate in order to get the rate? A. Yes sir, I think so, according to that tariff. The tariff is laid down so much to St. Louis, and so much over to different points in the east.

Q. The bills of lading; you get the blank forms from the railroad agent here? A. Yes sir.

Q. And keep them in your office? A. Yes sir.

Q. This cotton had been placed by you with the Compress Company, and the Compress Company had given you a ticket for each bale? A. I don't think at that time they gave a ticket for each bale. They gave a receipt in bulk for so many bales.

Q. Don't you remember that on the former trial you testified you had 50 tickets for 50 bales of cotton? A. There might have been 50 tickets. At one time they issued them singly, and then they issued them in bulk. I don't remember at that time. It was a receipt for 50 bales.

Q. For 50 bales of cotton? A. Yes sir.

Q. Do you remember that you used that receipt in the bank, —are those tickets in the bank? A. They are all in the bank.

22 Q. Were they there as a basis of credit? A. No sir, it was not a basis of credit. When cotton is paid for, if it is not making the amount of money we have invested in it we leave all our collateral at the bank.

Q. Why did you put these tickets in the bank? A. So that they are safe.

Q. To be security for the bank? A. It is their property; they have an equity in it.

Q. That is to secure the bank is it not? A. If you take it on that line, I suppose so.

Q. Don't you know that it is there to secure the bank for the advance they make? A. I think so.

Q. When you get ready to ship cotton you go to the banks and get the receipts and prepare the bill of lading in your office and then pin the compress receipts to it and send it to the railroad? A. Yes sir.

Q. You did it at that time? A. I don't remember. The banks must have held the receipt at that time.

Q. Don't you remember on the trial of the case before you did testify the bank did have these receipts? A. They did have them in their vaults.—we kept them there.

Q. And it is your best judgment now that the bank had these 50 receipts. A. Yes sir.

Q. You got them and pinned them to the bill of lading that your office force prepared and sent them down to the railroad agent? A. Yes sir.

23 Q. The railroad agent signed the bill of lading and returned it to you and kept the compress receipts? A. He takes up the compress receipts for 50 bales and executes to us a bill of lading in lieu thereof.

Q. This bill of lading you identified a while ago? A. Yes sir.

Q. That was the usual practice and custom was it not? A. Yes sir.

Q. The railroad company then takes them up to the compress and the compress the cotton and then the railroad sends it to where you want it shipped? A. I don't know what they do with it.

Q. This bill of lading that you got from the railroad company was sent back to the bank was it not and deposited? A. No sir.

Q. Was not this particular bill of lading deposited in the bank? A. It was not deposited. When we get a bill of lading, I draw a draft for the amount of the cotton, and attach it to the bill of lading and give it to the bank for collection and our credit.

Q. You gave it to the same bank that the receipts were taken from? A. Yes sir.

Q. You would not give it to any other bank? A. I don't think it would be right. I could have done it.

Q. In your arrangement with the bank were not you under obligations to give a bill of lading with a draft attached on your eastern customers? A. For 50 bales I don't suppose it would make any difference. I think perhaps we were solvent for 50 bales.

24 Q. Anyhow, you did put it in the bank,—in the same bank,—or that was the usual way? A. That is the channel for our business, yes sir. If we had sent the cotton absolutely and then had shipped it out, the bank would have gotten it just the same. That is our way of collecting it. And that is the only way we have of collecting.

Q. You spoke about the railroad soliciting this business: did the Texas & Pacific Railway Company solicit any business originating in Texarkana to go over the Iron Mountain Railroad out of Texarkana,—did they ever solicit any business from you to haul cotton to the state line and turn it over to the Iron Mountain? A. I could not say that they done it on this line.

Q. Do you know where you got these 50 bales? A. No sir, it came in here,—I think the majority of it came from the Texas & Pacific Railway Company, from Anona, Avery, Calvary and New Boston. Some of it might have come in over the Cotton Belt.

Q. That cotton was sent in here on the local rate? A. Yes sir.

Q. And shipped from these points you have indicated to Texarkana? A. Yes sir.

Q. Then the cotton was here on a local bill of lading from these points in Texas, you think? A. Yes sir.

Q. Is that the only reason why you applied to the Texas & Pacific Railway Company to ship it out; that where you concentrate cotton,—state whether or not you are big cotton buyers? A. Yes sir, we buy a good deal.

Q. You buy it at all the surrounding towns? A. Yes sir.

Q. Have you any arrangement with the railroad,
25 where you buy cotton and concentrate it here, to pay the local rate, and when the cotton is shipped out of here, they give you the same rate from the other points and refund the local rate; that they would give you there from New Bos-

ton to Utica the same rate as from Texarkana to Utica? A. They credited the point of origin to the through rate. They made a rate at the point of origin and they refunded all the rate down to the point of origin.

Q. I will call your attention to that letter of April 6th, 1901. A. You want me to read it?

Q. No sir, I want you to read it to refresh your memory. You asked that that cotton be shipped out over the Iron Mountain, didn't you? A. No sir.

Q. Don't you say so in that? A. That (indicating) part of it refers to it. They had instructions to deliver it to the Iron Mountain Railway. We don't direct. As I said before we were not permitted to route cotton.

Q. You say the way you got at this rate, was 60 cents to East St. Louis and then you add 25 cents? A. Yes sir, you asked me on that point. We have a basing point on various roads; we have a basing point for New Orleans on the T. & P.

Q. Was it your understanding that this cotton was going by the Iron Mountain from Texarkana? A. No sir. I am not positive. I thought it was going that way.

Q. You understood, when you got the bill of lading, that the cotton was to be turned over to the Iron Mountain at Texarkana. The Iron Mountain does not run to New York, does it? A. No sir, I don't think it does.

Q. The cotton would have to pass over two other lines? A. Yes sir.

Q. If your understanding was that the cotton was to
26 go over the Iron Mountain, why didn't you prepare and present a bill of lading to the Iron Mountain Company? A. I will have to go back to the history of—

Q. Is not the reason that you presented this to the Texas & Pacific Railway Company so that it would enable you to get your rebate on the local rate into Texarkana? A. In order to make them protect the through rate we are compelled to give the cotton to the road that brings it in.

Q. The through rates from New Boston and Anona are just the same as the Texarkana rate? A. I think not at that time. I think that the rate from Texas points at that time was a dollar.

Q. And from Texarkana 85 cents? A. No,—I beg pardon; I think it was 90 cents from that point.

Q. Do you remember what the local rate was from New Boston at that time? A. I think if you take it from Anona, the principal point we ship from, is 22 cents into Texarkana. I am not sure about that.

Q. Was the rate from Anona to New York 90 cents? A. Yes sir.

Q. Then you get a refund of 17 cents? A. Ought to, yes sir.

Q. Is not that the only reason you had for delivering the cotton to Texarkana? A. If the Texas ' Pacific Railway Company didn't get the cotton we would lose 17 cents. It is what we call a strong tie to the cotton, that makes it.

Q. You don't know what was done with that after the delivery to the railroad company? A. Personally I don't know.

Q. Do you know whether the compress operated on
27 the 17th, 18th and 19th? A. I think not. Of course I don't know.

Q. Your understanding is that the cotton was burned on the compress company's plant? A. Yes sir, burned on the 19th of September.

Redirect Examination

By Mr. Arnold:

Q. Did you have anything to do with the compression of this cotton, or was it done for your benefit? A. No sir, we have nothing to do with it.

Q. Who paid for the compression of the cotton? A. Personally I don't know,—I can not say. It is like a great many other questions, but I don't know personally.

Q. It was for the convenience of the railway company in handling it? A. Yes.

Q. Explain more fully to the jury what you mean by the rate from New Boston to Utica and where this rebate would come in. A. The rate from New Boston, we will say, at that time, or from Anona, was 90 cents per hundred. In concentrating this cotton we take a local bill of lading to the compress, the nearest point, and I think we paid 22 cents a hundred in. Now, in regard to getting the refund of the 17 cents a hundred, we are compelled to give the cotton back to the road that brought it in: in other words, they have a string tied to the cotton: in other words if we don't give it to them, we lose that 17 cents; and we are forced to give it to them to protect the point of origin.

28 Q. In other words if you want to ship the cotton from New Boston to Utica, it would take 90 cents? A. I would not take the same kind of a bill of lading.

Q. But if you shipped it from Texarkana you paid 85? A. Yes sir.

Q. It is for the convenience of the railway company they want to compress it? A. Yes sir.

Q. That is no advantage to you one way or the other? A. No sir.

Q. And when they shipped it from New Boston to this point, they charged you first, the local rate, but when you came to the final settlement,—and when the cotton is finally shipped to the

east, and you came to a settlement with them, they allowed you the same from New Boston and these outlying points? A. Yes sir. I don't remember. I think the rate from those points to Utica was 90 cents at that time. The business may be changed now. That is the rule—they will protect the point of origin. In other words if the rate from Anona and those points had been 85 cents, when we delivered the cotton to them, they would have refunded all the local rate, 22 cents instead of 17.

Q. That was the arrangement as to all their shippers? A. Yes sir.

Q. Was that true as to all other railroads? A. Yes sir, they have a general rule.

The Court: Had you any agreement at all with the compress company to compress this cotton?

[A.] The Witness: No sir.

The Court: Was the compress in the habit of compressing all your cotton that was shipped to it?

29 The Witness: I don't know. I could not say.

The Court: You had nothing to do with it?

The Witness: No sir.

The Court: Cotton was delivered to that compress company by your order?

The Witness: Yes sir. I could not say. Sometimes the shipper might make a mistake and send it to us. Of course we want it at the compress because that is a concentrating point for all contracts. We might have requested that of any cotton that came in here that was not consigned to us.

Q. State to the jury why it was you wanted it delivered to the compress, if you had nothing to do with the compressing of it. A. It was a place for concentration where we could hold it and load it out to the railroads.

Q. Did the railroad have any other place to receive this cotton and ship it out? A. No sir; but they may have had a platform of theirs. They generally have a little platform, and they would accept it if it was delivered there.

Q. Have they such a platform? A. No sir, I don't think they have a cotton platform.

Q. In other words if you had cotton brought to Texarkana, you would have it carried to the compress so you could ship it from there,—that is the place they receive the cotton for shipment? A. Yes sir, often our cotton we buy on the streets is sent there.

Q. And the railway company receives the cotton at that point and issues bills of lading? A. Yes sir.

Q. And that is the only place you know here that the T. & P. Railway would receive cotton? A. Yes sir.

30 Q. Has the bank any interest in this bill of lading? A. No sir.

Q. Did you take up that bill of lading? A. Yes sir.

Q. Did you take up that draft and bill of lading when you ascertained the cotton had been burned? A. Yes sir.

Q. And you have had it ever since? A. Yes sir, the courts have had it.

Recross Examination

By Mr. Glass:

Q. If the shipment of cotton was made to you from New Boston to Texarkana, and there was no instructions for the railroad company to deliver it to the compress, they would not do it,—they would deliver it to the depot? A. No sir? As I remarked, years ago we requested whenever any cotton came in here, we requested the railroad to deliver it to the compress, —we may have made that request,—I think we did. Of course we want the cotton all in bulk.

Q. Your office is here in Texarkana? A. Yes sir.

Q. When you have cotton in Anona and New Boston, why don't you get a through bill of lading? A. This is our place of concentration. We ship to any point on order.

Q. If you get an order for so many bales of cotton,— A. I would say further that our classifier is in Texarkana, and we cannot classify in Anona and those points,—cannot afford to furnish one.

31 Q. You think you gave the railroad your instructions, —in making out shipping instructions your representatives at Anona and New Boston,—they are instructed by you when they ship cotton to Texarkana, to ship it to the compress? A. Yes sir, they ought to be. We prefer to have them do it.

Q. Then you want your cotton shipped there? A. Yes sir.

Q. Then if you get your cotton in New Boston [of] at Anona,—or at New Boston or up here about Ashdown, you would have it shipped back here to Texarkana? A. Yes sir.

Q. That was because you had your classifier here, and your office here? A. Yes sir, it is more convenient in a general way. We can look after it and keep it thoroughly insured.

Q. It is your wish and choice to do it? A. Yes sir.

Q. To send it here? A. Yes sir.

Q. And doing that you pay the local rate into Texarkana and ship it in here locally? A. Yes sir, from all small points.

Q. The bill of lading reads from this point to Texarkana? A. Yes sir.

Q. The cotton is turned over to the compress company as your cotton? A. Yes sir.

Q. You send your man there to classify it? A. Yes sir.

Q. And the compress company gives you a receipt
32 for it? A. Yes sir.

Q. You take these receipts and hold them and when you get ready to ship it out you take the receipts to the railroad company and get a bill of lading? A. Yes sir.

Q. You have an arrangement with the railroads that if a certain railroad brings in cotton locally and charges you locally, that if you will deliver that cotton to them they will protect the through rate from the point where you ship it locally? A. Yes sir, the railroads don't require the identical cotton, but if they bring in a thousand bales they want a thousand bales.

Q. They do that and charge you the local and say no more to you about it? A. Yes sir.

Q. And in order for you to have your through rate protected you must turn over the thousand bales? A. Yes sir.

Q. And they protect the rate from the point of origin? A. Yes sir, but if the local rate is very much in excess of that through rate it is what we term a string attached to the cotton.

Q. And when you do ship it out you ship out the same number of bales you get in, whether it is the same cotton,—[in] makes no difference? A. No sir.

Q. Then the railroad will refund to you the difference between the through rate from Texarkana and the local rate from the point of origin? A. Yes sir it protects the point of origin.

Q. You get the benefit of that through rate from the
33 point of origin, where the cotton originated, and the handling of it here to Texarkana under your observation and control? A. Yes sir.

Mr. Arnold: And the railway company gets the benefit of having it compressed at that point? A. Yes sir.

(Recess to 1:45 P. M.)

Afternoon session.

(Same witness on the stand)

Examination by Mr. Arnold resumed:

Q. You referred this morning to an understanding between W. A. Arthur and Company and the Texas & Pacific Railway Company whereby a part of the local rate for cotton shipped in from small towns around about Texarkana, would be refunded whenever a through bill of lading was furnished to you; state whether anything was deducted from this particular bill of lading, the one we are suing on now for the 50 bales of cotton? A. No sir, there is no deduction made for that. If there was we could not use that bill of lading to collect local charges.

Q. State to the jury when these items would be refunded that you refer to on account of local shipments,—was it ever

done until the through bill of lading was taken? A. Not until after the through bill of lading was taken and then the refund would then be made or claimed to be with a copy of that bill of lading attached to the claim and with the expense bills attached thereto.

The Court: What do you mean by expense bills?

The Witness: Local freight that was collected on the cotton, and any expense we had been to would be attached to the bills.

34 Q. In other words you would pay the local freight rates whenever you made shipments to the east? A. We would pay the through rate from Texarkana, and if the through rate from the point of origin was the same of course there would be no reduction.

Q. Then the refund would be paid on the local shipments subsequent to the time that you shipped? A. Let me see,—in order to collect that back the cotton has to be billed out before we can put any account in.

Q. Then the charge here of the freight in that bill of lading, was the full freight without any deduction from it? A. Yes sir.

Questions by Mr. Glass:

[—] You don't know whether these 50 bales of cotton came in on the Texas & Pacific Railway Company or not? A. No sir, I could not tell.

Q. You bought a good deal of cotton on the streets? A. Yes sir.

Q. And the cotton you bought on the streets you would send to the compress company and get their tickets? A. Yes sir.

Q. And the same way with the cotton you shipped in locally on the railroads? A. Yes, sir, that is what we term free cotton; though of course the roads were very anxious to get that,—that is what is called free cotton.

Q. This concentration of cotton here was for your benefit? A. It was an advantage to us as well as to the railroad; I think it is mutual.

35 Q. Say the rate from Clarksville to Utica was 90 cents and they shipped out from there and charged you 15 cents for the local rate, and it was put in the compress company and compressed and then shipped out, and the balance turned over to you, and the railroad only got the through rate? A. Yes sir, it got the 90 cents or the 85,—whatever the through rate was from there. We could not take Clarksville from the fact that they have a compress there.

Q. Say the through rate from De Kalb to Utica was 90 cents, and you would get the bill of lading issued to you locally, you paying the freight, 15 cents a hundred,— A. 15 or 20.

Q. Finally when it was shipped out the railroad only got the 90 cents? A. Yes sir. That is if they got the cotton back.

Q. If they hauled the cotton through they got 90 cents for the through shipment to Utica,—was that concentration done for your benefit? A. No sir, I would say not, because if it was done wholly for us they would not have done it.

Q. Who requested it to be done? A. I just want to illustrate why it was no more to their benefit than to ours,—we requested it all to be shipped in there,—

Q. Could not they give a through bill of lading from De Kalb to Utica and have only one transaction? A. Yes sir, but suppose they would move 10 bales at a time. They load it on of course, and bring it to Texarkana, and have to unload it for compression, and have to reload,—in other words they could bulk it.

36 Q. Don't you know, so far as the railroads are concerned, they could do their business if they gave a through rate from the point of origin each time? A. I know; but they would have to have some good man at each of these little towns to handle that local business.

Q. Your idea is that it was partly for the benefit of the railroads that the cotton was concentrated at Texarkana? A. I think it is mutual.

Q. You requested it to be done with your company? A. Yes sir.

Q. That was done for the purpose of getting it here where your classifier could go and examine the cotton and classify it; and when you got orders to ship cotton of a certain character that you could select it out of the larger lot? A. Yes sir.

Q. That would not be practical with a smaller amount of cotton? A. Unless that thing existed we would have to put 5 or 6 bills of lading on.

Q. Say you get an order for 500 bales of cotton of a certain character: if you were not allowed to concentrate it at some point where you would have a large number of bales, it would be a hard matter to get 500 bales of that class? A. Yes sir it would. We would have to go to several concentrating points. They concentrate there from both directions.

Q. When the cotton is put on at the cotton compress platform at Texarkana, your man goes there to classify it? A. There is a man for that purpose. And sometimes the compress sends samples.

37 Q. And they are sent to your office and they go there and classify it? A. Yes sir.

Q. And that is the reason you want the cotton concentrated at Texarkana? A. We prefer that at all concentrating points.

Q. The cotton that you handle on wagons is handled in the same way except there is no refund of course? A. Yes sir, it is free cotton and of course the railroads all like to get it.

Q. It is free cotton and you take the receipts the same as you do the others. A. That being the shipping point for Texarkana, and a loading point.

Questions by Mr. Arnold:

Q. Do you know whether this arrangement with reference to the rebate or the local rate was peculiar between you and the Texas & Pacific Railway Company, or did the other shippers have the same rate? A. Other shippers had the same rate and other roads granted the same rate.

Q. It is mutual between all roads and all shippers? A. Yes sir.

Witness excused.

38 W. A. Arthur, one of the plaintiffs called in his own behalf being first duly sworn, testified as follows:

Direct Examination

By Mr. Arnold:

Q. Is your name W. A. Arthur, and are you one of the plaintiffs in this case? A. Yes sir.

Q. How long have you been in the business of buying and selling and shipping cotton? A. Why, do you mean in my own name or as a buyer?

Q. I don't care; it makes no difference. A. I have been twenty years,—about ten or twelve years for myself.

Q. How long have you been shipping cotton over the Texas & Pacific Railway? A. About twelve years in my own name.

Q. Examine this bill of lading (shipping paper) and state whether you ever have seen it before? A. Seen this bill of lading?

[A.] Yes sir. A. Yes sir.

Q. Do you recognize that as being the bill of lading issued to W. A. Arthur & Company for 50 bales of cotton for shipment to Utica, New York? A. Yes sir.

Q. Is this the form of bill of lading the Texas & Pacific Railway Company issued for shipment to eastern points? A. On domestic shipments?

Q. I notice in that bill of lading a clause exempting the company from liability by fire? A. Yes sir.

39 Q. State whether you have noticed that in the bills of lading for several years past? A. Yes sir, and we have in several instances tried to erase it, but were denied the privilege.

Objected to as incompetent and irrelevant and immaterial. Objection overruled. Defendant excepts.

Q. State what efforts you have made at different times to get the Texas & Pacific Railway Company to accept shipments without putting that clause in the bill of lading,—I refer to times prior to the execution of this bill of lading?

Objected to because that is not this contract, and is immaterial. Objection overruled. Exception for defendant.

A. We have in several instances with the fire clause erased on objections raised by eastern clients,—treasurers of mills,—but they have denied us the right to erase this clause so often that we finally got so we accepted the bill of lading under protest.

The Court: Prior to the time this bill of lading was executed you had succeeded in getting them to strike out the fire clause a number of times?

The Witness: No sir. We would strike it and send it to agents and at towns, and they would object to it, and we would very often have to send others to them.

Q. Do you know in regard to the division of freights between railroads,—for instance in this shipment here, where the Texas & Pacific Railway Company ships to Utica, New York,—do you know anything about what benefit or advantage there was to the Texas & Pacific Railway Company in taking and accepting a shipment of this kind and what advantage,—what part of the freight they would get by reason of that?

Objected to as immaterial.

40 Mr. Arnold: What I want to know is what proportion of this freight would go to the Texas & Pacific Railway Company. I would prove by this, I think, that the Texas & Pacific Railway Company got about $2 a bale.

The Court: Then, isn't that purely a matter of arangement between the railroads. It doesn't seem to me that that is important at all.

Mr. Arnold: You may strike that out.

Q. State whether the Texas & Pacific Railway Company solicited the business of your firm prior to the time this bill of lading was signed? A. Oh, well, it is a very common thing for them to solicit business with all shippers; in fact that is

part of their business, to solicit business. Of course they solicit at all times, from week to week. That is part of their business.

Cross-Examination

By Mr. Glass:

Q. When did you make the application to have the fire clause stricken out? A. Ever since we have been in business at different times.

Q. At what points? A. At Franklin, and Berry and here.

Q. What agent here did you apply to? A. I can't remember now, because we have done it so often.

Q. How long since you last did make it before this fire? A. My memory is not good enough to give you the exact date on those things.

Q. Do you swear you ever did, at Texarkana, request them to strike out the fire clause and they refused to do it? A. Yes sir.

41 Q. Of what agent did you make that request? A. I don't remember?

Q. You didn't make it in this bill of lading? A. No sir.

Q. Don't you know who you sent it down there by? A. No sir.

Q. You spoke about accepting it under protest; what do you mean by that? A. When we present a bill of lading to the agent and say this clause that we don't like,—we would say that our clients in the east will not pay with this clause in it and that we would like to strike it out, and they would wire sometimes for authority, and then we have accepted it, and we have to ship cotton.

Q. Did you make any request to have it stricken out in this particular bill of lading? A. I cannot remember positively in this particular bill of lading that we did; that we accepted it under protest for if they put a clause in there and insisted on it being there we have to take it

Q. As a matter of fact you didn't protest this particular bill of lading,—you wouldn't undertake to swear that there was any protest? A. No sir. I would swear we made protest on the form, but not on this particular bill of lading, and in case we were denied yesterday or the day before, we would get tired of doing it.

Q. The objections you made were on account of some objections of some of your customers in the east? A. Yes sir.

Q. You didn't object to it on your own account? A. Yes sir.

Q. It was on account of the objections of your cus-
42 tomers in the east that you objected to that clause? A. Yes sir, if the man in the east takes the bill of lading we are not particularly interested in it.

Q. I am not asking your reasons; you say you did it because your eastern customers object to it,—is that true? A. Yes sir, because if they would not question my liability east and it is a matter for them,—

Q. Please answer my question: did you object to it because your eastern customers objected to it? A. Yes sir. If they assumed their liability over the railroad without me being liable I didn't care what clause they put in it.

Q. You knew that the fire clause was in there when you got this bill of lading? A. Yes sir.

(Witness excused.)

Mr. Arnold: I will now read the deposition of C. P. Hovey.

The Court: That is the joint agent of the railroad companies here?

Mr. Arnold: Yes sir.

The Court: What is his name?

Mr. Arnold: C. P. Hovey. I will read his deposition:

(reading) The deposition of C. P. Hovey taken on the 30th day of May, 1901, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon, at the office of W. H. Arnold, in the City of Texarkana, in Miller County, in the State of Arkansas, to be read in evidence in the cause pending in the Miller Circuit Court, wherein W. A. Arthur & Co. are plaintiffs and Texas and Pacific Railway Company is defendant.

C. P. Hovey, a witness for the plaintiff, after being first duly sworn testified as follows:

43 Q. State your name, age, place of residence and occupation? A. C. P. Hovey, age 42, occupation agent for the Texas and Pacific Railway Company.

Q. What has been your occupation for the last twelve months? A. Joint agent of the Iron Mountain Southern Railway and the Texas and Pacific Railway Company.

Q. State whether during that period it was part of your duty to issue Bills of Lading as agent for the Texas & Pacific Railway Company for the shipment of cotton in the State of Texas and to points outside of this State and to points beyond the United States? A. Yes sir; it was.

Q. I hand you what purports to be a bill of lading issued September the 17th, 1900, for the shipment of 50 bales of cotton belonging to W. A. Arthur & Co., to and shipped to their order at Utica, New York. Please examine this bill of lading and state whether it was the original that was issued to these parties? A. Yes sir, this is the original bill of lading.

Q. Will you please attach as exhibit to your deposition a compared copy of this bill of lading? A. Yes, I will attach

a compared copy and now do so, and mark the same exhibit "A" and make it a part of my deposition.

Q. State how many forms of bills of lading you as such agent are authorized to issue in behalf of the Texas and Pacific Railway Company for the shipment of cotton? and attach as exhibits to your deposition such forms? A. We have three forms of bills of lading which we issue, one known as the domestic bill of lading for the shipment of cotton within the state of Texas, I attach a copy of this form as exhibit "B" to my deposition; also what is known as the Inter-State cotton bill of lading, which is issued to all points within the United States, out of the State of Texas, the form of this Bill of Lading is shown by exhibit "A" heretofore filed; also another bill
44 of lading known as the export cotton bill of lading which is given for cotton consigned to foreign ports, a form of which I attach as exhibit "C" to my deposition.

Q. Were these the only forms of bills of lading which you are authorized as agent of said company to issue for the shipment of cotton on the 17th day of September, 1900? A. Yes sir, they were.

Q. Please state where your office is located, I mean where was your office on the day this bill of lading was issued to W. A. Arthur & Co. on the 17th day of September, 1900? A. My office was in Arkansas in the building furnished by the St. Louis, Iron Mountain and Southern Railway Co., which is used as a joint office of the St. Louis Iron Mountain & Southern Ry. and the Texas and Pacific Ry.

Q. State whether the freight business of Texarkana, Ark. and Texarkana, Texas, for these two roads is transacted in that office and if so, how long such business has been transacted there, to your knowledge? A. Yes sir, it has been for the last 20 years, and to my personal knowledge for eight years.

Q. Where was this bill of lading of W. A. Arthur & Co. signed and delivered? A. It was signed and delivered in these offices.

Cross.

[Withouy] waiving any right of the defendant in the above suit and subject to any objections that may be legally made to the use of the foregoing deposition defendant propounds the following cross interrogatories:

Q. Where was the fifty bales of cotton mentioned in the bill of lading to W. A. Arthur and Co. at the time you signed
45 the same? A. It was at the Union Compress, in Texarkana, Texas.

Q. Was the bill of lading marked exhibit "A" and attached to your deposition fully made out ready for your signature

when it was presented to you by W. A. Arthur & Co.? A. Yes sir; it was.

Q. Was the aforesaid bill of lading filled out by W. A. Arthur & Co. and afterwards brought to your office in Texarkana, Arkansas, and presented to you for your signature? A. Yes sir, it was.

Q. Were any objections made by W. A. Arthur & Co. or any member of that firm to the form or the conditions contained in said bill of lading? A. No sir.

Redirect.

Q. Please state whether you were authorized to quote any different rate of freight to shippers of cotton than that furnished to W. A. Arthur & Co., or to strike any of the conditions of the bill of lading? A. No sir.

Q. W. A. Arthur & Co. had shipped a large amount of cotton over your road prior to the issuance of this bill of lading had they not under the same form of bills of lading? A. Yes sir.

Q. Where did they get this form of the bill of lading which they brought to you filled out? A. From my office; we furnished the forms of the bills of lading at the request of W. A. Arthur & Co.

(Signed) C. P. HOVEY.

Exhibit "A" referred to is same as Bill Lading read in evidence of John C. Ware page 12.

Form 119 Revised.

# THE TEXAS & PACIFIC RAILWAY COMPANY.

## DOMESTIC COTTON BILL OF LADING.

Bill of Lading No. .....

T. & P. Contract No. .....

.....R. R. Contract No. .....

Received by TEXAS & PACIFIC RAILWAY COMPANY, in apparent good order and well-conditioned, of.....for delivery to.....
.....or their assigns, at .....
.....he or they paying freight and charges as per margin, the following articles, to say:.....
..... Bales of Cotton.

From .....

To .....

Route:

Via .....

.....

.....

.....

Gross weight pounds.....

Through Rate per 100 lbs.....

.....

.....

Total Freight, $.....

Advanced Charges, $.....

| Number. | Marks. |
|---|---|
| | EXHIBIT "B" TO C. P. HOVEY'S DEPOSITION. |
| | ..... |
| | ..... |
| | ..... |
| | ..... |
| | ..... |

UPON THE FOLLOWING TERMS AND CONDITIONS, WHICH ARE FULLY ASSENTED TO AND ACCEPTED BY THE OWNER, VIZ.:

1. THAT THE LIABILITY OF THE TEXAS & PACIFIC RAILWAY COMPANY, IN RESPECT TO SAID COTTON, AND UNDER THIS CONTRACT, IS LIMITED TO ITS OWN LINE OF RAILWAY, AND WILL CEASE AND ITS PART OF THIS CONTRACT BE FULLY PERFORMED UPON DELIVERY OF SAID COTTON TO ITS NEXT CONNECTING CARRIER; AND IN CASE OF ANY LOSS, DETRIMENT OR DAMAGE DONE TO OR SUSTAINED BY SAID COTTON BEFORE ITS ARRIVAL AND DELIVERY AT ITS FINAL DESTINATION, WHEREBY ANY LEGAL LIABILITY IS INCURRED BY ANY CARRIER, THAT CARRIER ALONE SHALL BE HELD LIABLE THEREFOR IN WHOSE ACTUAL CUSTODY THE COTTON SHALL BE AT THE TIME OF SUCH DAMAGE, DETRIMENT OR LOSS.

2. That the rate of freight for transportation of said cotton, specified in the margin hereof, is quoted and guaranteed with the distinct understanding and only on condition that the weight of said cotton is truly and correctly represented and stated; that said rate only includes the charge for transportation, and the specification of said rate shall not be taken as any guide for construction or evidence to extend this contract in other respects, or to bind the Texas & Pacific Railway Company to transport or to become in anywise responsible for said cotton after delivery thereof to its next connecting carrier, but shall only bind said company to protect said rate.

3. That neither the Texas & Pacific Railway Company, nor any connecting carrier handling said cotton, shall be liable for damage to or destruction of said cotton by fire, nor for any loss or depreciation in the weight thereof, nor for any damage or injury thereto caused by water, moisture, decay, dirt, bursting or breaking of bagging or ties, nor for any other damage or injury thereto arising from imperfect baling or pressing; nor for any loss or damage thereto by collision, or any of the other dangers of navigation and perils of sea while on seas, gulfs, lakes, rivers and canals.

4. That the said cotton is subject, at its owner's cost, to the necessary repairs and baling; and the consignees are to pay freight and charges on said cotton in lots or parts of lots as delivered.

5. That if said cotton, or any part thereof, shall be lost, damaged or destroyed by means or under circumstances rendering the Texas & Pacific Railway Company, or any connecting carrier, liable therefor, the damages recoverable therefor shall be computed at its value at the time and place of shipment, as evidenced hereby. It is expressly agreed and understood that the recitation in this bill of lading, that the cotton was received "in apparent good order and well conditioned," refers only to its external appearance, and if the said cotton is found damaged at the point of delivery, the burden of proof shall be upon the owner of said cotton, or the claimant for damages, to show, affirmatively, that the cotton was actually in good order and well conditioned when receipted for, it being understood that the carrier only obligates itself to deliver said cotton in like order and condition to the consignee, the unavoidable wear and tear and deterioration in due course of transportation only excepted, as when received by it.

6. It is further agreed that in case said cotton is found at point of delivery to have been injured by any of the excepted clauses specified in this bill of lading, the burden of proof shall be upon the owner of said cotton, or claimant, to establish that such injury resulted from the fault of the carrier.

7. That no suit or action against the Texas & Pacific Railway Company on any claim for damages arising from any breach of this contract, or injury to, or loss or destruction of said cotton, shall be sustained in any court unless notice in writing, distinctly setting forth the claim, shall be given to the nearest or any other convenient local agent of said The Texas & Pacific Railway Company before the expiration of ninety days from the date of accrual of such claim; and in no event shall any suit or action in any court, for damages arising from any breach of this contract, or for damages or injury to, or loss or destruction of said cotton, or any part thereof be sustained, unless the same shall be commenced before the expiration of two years from the date when such breach, injury, loss or destruction occurred and the lapse of such time shall be conclusive evidence against the validity of such claim and demand.

8. Each carrier over whose route cotton is to be carried hereunder shall have the privilege, at its own cost, of compressing the same in accordance with the rules and regulations promulgated by the Texas Railroad Commission governing the compressing of cotton, and no carrier shall be held responsible for delays in procuring such compression, and shall not be liable for loss or damage to cotton by any cause while in the compress or on side-track or platform appurtenant thereto.

9. That the acceptance of the Bill of Lading shall be deemed conclusive proof of the assent of the owner of said cotton to all the terms and conditions written or printed hereon.

IN WITNESS WHEREOF, the Agent signing for the Railway Company hath affirmed to.....Bills of Lading, of this tenor and date, one of which being accomplished the others to stand void.

Dated at..... this.....day of .....190....

..... Agent.

Form 1425.

# THE TEXAS & PACIFIC RAILWAY COMPANY.

## EXPORT COTTON BILL OF LADING.

Bill of Lading No. .....

T. & P. Contract No. .....

.....R. R. Contract No. .....

.....S. S. Line Contract No. .....

Received at..... from .....
....., the following property, in apparent good order and well conditioned, except as noted, to-wit: .....bales of cotton, marked, consigned and destined as indicated below:

From .....

To .....

Route.

Via.....

.....

.....

Gross weight at point of shipment, pounds .....

Through rate per 100 lbs.....

.....

Exchange at $4.80 per Pound Sterling.

.....

Total Freight, $.....

Advance Charges, $.....

| Number. | Marks. |
|---|---|
| EXHIBIT "C" TO C. P. HOVEY'S DEPOSITION. | |
| ..... | ..... |
| ..... | ..... |
| ..... | ..... |
| ..... | ..... |
| ..... | ..... |

To be carried to the port of.....
....., and thence by.....
Steamship Line to the port of.....
(or so near thereto as ship may safely go, with liberty to call at any usual port of call), and there to be delivered unto .....
....., or to..... assigns, notify .....upon payment, immediately on discharge of the property, of the freight thereon, at the rate from.....to.....
of .....cents United States Gold Currency, per 100 pounds gross weight, and advance charges.....
Dollars, together with all their charges and average, without any allowance or credit or discount; One Pound Sterling to be equal to $4.80 United States Gold Currency.

IN CONSIDERATION OF THE RATE OF FREIGHT HEREIN NAMED, IT IS HEREBY STIPULATED THAT THE SERVICE TO BE PERFORMED HEREUNDER SHALL BE SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS, AND SAID TERMS AND CONDITIONS ARE HEREBY AGREED TO BY THE SHIPPER, AND BY HIM ACCEPTED FOR HIMSELF AND HIS ASSIGNS AS JUST AND REASONABLE.

### CONDITIONS.

1. That the liability of The Texas & Pacific Railway Co. in respect to said cotton, and under this contract, is limited to its own line of railway, and it shall not be liable for any loss, detriment or damage done to or sustained by said cotton not occurring on its own road, nor after said cotton has been delivered, or is ready for delivery to the next connecting carrier or to consignee.

2. That the rate of freight for the transportation of said cotton specified in the margin hereof is quoted and guaranteed, with the distinct understanding and only on condition that the weight of said cotton is truly and correctly represented and stated, and that said rate only includes the charge for transportation, and the specification of said rate shall not be taken as any guide for construction or evidence to extend this contract in other respects, or to bind The Texas & Pacific Railway Co. to transport, or to become in anywise responsible for said cotton after delivery thereof to its next connecting carrier, but it shall only bind said company to protect said rate.

3. That neither The Texas & Pacific Railway Co., nor any other connecting carrier handling said cotton, is bound to carry said property by any particular train or vessel or in time for any particular market, or otherwise than with as reasonable dispatch as its general business will permit. That neither The Texas & Pacific Railway Co. nor any connecting carrier handling said cotton shall be liable for damages to or destruction of said cotton by fire, nor for any loss or depreciation in the weight thereof, nor for any damage or injury thereto caused by water, moisture, decay, dirt, bursting or breaking of bagging or ties, nor any other damage or injury thereto arising from imperfect baling or compressing; nor for any loss or damage thereto by collision, nor any of the other dangers of navigation, or perils of

6. That if said cotton, or any part thereof, shall be lost, damaged or destroyed by means or under circumstances rendering The Texas & Pacific Railway Co., or any connecting carrier, liable therefor, the damages recoverable therefor shall be computed at its value at the time and place of shipment, as evidenced hereby.

7. It is expressly agreed and understood that the recitation in this bill of lading, that the cotton was received "in apparent good order and well conditioned," refers only to its external appearance, and if said cotton is found damaged at the point of delivery, the burden of proof shall be upon the owner of said cotton, or the claimant for damages, to show affirmatively that the cotton was actually in good order and well conditioned when receipted for, it being understood that the carrier only obligates itself to deliver said cotton in like order and condition to the consignee, the unavoidable wear and tear and deterioration in due course of transportation only excepted, as when received by it.

8. No carrier shall be liable for delay, nor in any other respect than as warehouseman, while said cotton awaits further conveyance, and in case the whole or any part of the cotton specified herein be prevented, for any cause, from going from said port in the first steamer of the ocean line above stated, leaving after the arrival of said cotton at said port, the carrier then in possession of said cotton is at liberty to forward same by succeeding steamer of said line, or, if deemed necessary, by any other steamer.

9. This contract is executed and accomplished, and the liability of The Texas & Pacific Railway Co., as common carrier under said contract is terminated on the delivery of said cotton to any connecting railroad carrier at the usual place set apart by said carrier for the receipt of cotton, or upon the delivery of said cotton to ..... Steamship Company, its master, agent or servants, or to any steamship of said company, or when said cotton shall have been unloaded on the wharf or steamship pier, or upon the platform or in the warehouse of The Texas & Pacific Railway Co., at said port of....., and said steamship company duly and reasonably notified thereof.

10. Upon the delivery of said cotton to said ocean carrier at the aforesaid port, said cotton shall be subject to all the terms and conditions expressed in the bills of lading and master's receipt in use by the steamship or steamship company or connecting lines by which said cotton may be transported, and upon delivery of said cotton at the usual place of delivery by the steamship or steamship lines carrying the same at the port of destination, the responsibility of said ocean carrier shall cease.

11. It is further agreed that the inland freight and charges shall be a first lien upon said cotton, due and payable by the steamship company.

IN WITNESS WHEREOF, the agent signing on behalf of The Texas & Pacific Railway Company, and of the said steamship company or steamer and her owner, severally and not jointly, hath affirmed to..... .....bills of lading, all of this tenor and date, one of which bills being accomplished, the others to stand void.

Dated at.....

the.....day of....., 190.....

.....

Agent severally but not jointly.

46 V. E. Buron, a witness called for plaintiffs being first duly sworn testified as follows:

Direct Examination

By Mr. Arnold:

Q. In what were you engaged on the 17th of September, 1900? A. I was chief clerk of the Iron Mountain and T. P. in the Texarkana local freight office.

Q. State where this office is located? A. On the Arkansas side.

Q. About how far from the state line? A. It is about three blocks.

Q. That was the joint office of the St. Louis Iron Mountain & Southern Railway, and the Texas & Pacific Railway Company? A. Yes sir.

Q. Where was this Union Compress located? A. It was located on the Texas side.

Q. About how far from the state line? A. About three hundred yards.

Q. At this joint office you speak of,—was there a freight depot there? A. Yes sir.

Q. What was that used for? A. It was to facilitate the business of the two roads, and also to receive local freight at the warehouse attached to the freight office.

Q. Do you mean that is where the merchandise was stored for shipment in and out? A. Yes sir.

47 Q. Where did the Texas & Pacific Railway Company get the cotton for which you issued bills of lading? A. It was customary to send it to the compress.

Q. To send it there? A. Yes sir, all cotton was received there.

Q. Where did the railroad company receive the cotton that it would issue bills of lading for? A. It was usually at the compress when we signed the bills of lading for it.

Q. That was the only place that was prepared for the reception of the cotton? A. At that time, yes sir.

Q. State whether you signed Mr. Hovey's name to the bill of lading I showed you? A. Yes sir.

Q. State the circumstances under which that was issued? A. In what way?

Q. If you knew where the cotton was. A. Mr. Arthur sent the compress receipts for those 50 bales and we gave the compress instructions as to the loading, and cancelled those compress receipts.

Q. And you gave Mr. Arthur the bill of lading? A. Yes sir, I signed the bill of lading and sent it by the boy, or whoever brought the bill of lading to us.

Q. When you received from this cotton compress receipts, what did you do with them? A. There is a form in the office with the bales of cotton and marks in duplicate. It is perforated in the middle. Then we send these cotton duplicates or cotton receipts, to the compress and they tear out the perforated part and sign the original in the book. It is in the book.

The Court: Sign what?

48 The Witness: Whoever signed for the cotton. It was partly a receipt.

Q. In this instance the railway company got a receipt for the cotton from the compress company? A. Yes sir, the regular form.

Q. The railroad company having surrendered the checks Arthur had? A. Yes sir, I don't know what the company did with the checks or receipts.

Q. In regard to your instructions,—did you instruct the compress company how to load it for compression? A. No sir, it was understood. We never gave them any special instructions each time. It is the understanding they were to compress it.

Q. You instructed them how to load it? A. Yes sir.

Q. Do you remember what cars you instructed them to load these 50 bales in? A. That I would not know until I saw the original stub.

Q. That would show whether you instructed them to load them in the T. P. car, the Iron Mountain car or some other car? A. Yes sir.

Q. Frequently those shipments were diverted from the T. P. Company to some other company? A. What do you mean by "diversion"?

Q. In all probability didn't you direct these to be shipped by the Iron Mountain road? A. Yes sir.

Q. And loaded into their cars? A. Yes sir.

49 Q. W. A. Arthur & Co. had no further control of the cotton after you got their receipts,—after you signed that bill of lading? A. I don't know; that would be a question. We signed the receipt for the cotton.

Q. You exercised control? A. Yes sir.

Q. Did you report this cotton to any other office after you had received it? A. I reported and asked for instructions immediately I signed this bill of lading. I asked for instructions from the general office at Dallas.

Q. Do you do that always? A. We wired the general office at Dallas for instructions &c.

Q. What did the general office instruct you to do? A. As it is now, until I could see the records, I can not say what in-

structions were given in this specific case. They gave the rates and gave us instructions.

Q. Did the Iron Mountain Company take out insurance,—I mean the Texas & Pacific Railway Company? A. Yes sir.

Q. Who did? A. The compress did.

Q. For whose benefit? [Q.] For the benefit of the T. P. road. The policies were in the name of the T. P. road.

Q. To whom were the policies delivered? A. They were delivered to me, or rather Mr. Hovey, the agent, and I forwarded them to Dallas.

50 Q. Who paid for the premiums? A. The compress.

Q. Who paid for the compression of the cotton? A. The railroad company.

Q. Was that the general course of business between the railroad and the compress company? A. Yes sir.

Q. Did the railway require the compress company to carry this insurance? A. That I don't know; it has been customary.

Q. Did you go around to the compress from time to time? A. Yes sir, I made it a business to go there every ten days.

Q. Were you there a few days before the fire? A. Yes sir, I was there.

Q. Were you there the day this bill of lading was issued? A. Yes sir, I was there that day or the day before.

Q. What was your purpose? [Q.] It was customary to go there, and I think the object of my visit the last time,—it was the 15th or 17th or 18th,—I made a business of checking how much cotton there was at the compress and if I noticed there was not sufficient insurance,—

Q. Did you have it increased at once? A. Yes sir.

Q. That insurance covered this cotton did it? A. I suppose so; it was generally blank insurance.

Q. It would cover any cotton after it was put there? A. Yes sir.

Q. Are you familiar with the freight rates of the Texas & Pacific Railway Company? A. Yes sir.

51 Q. State whether the freight charges in that bill of lading are the regular freight rates for the shipment of cotton to Utica, New York? A. Yes sir, the rate of 85 cents is correct at the time.

Q. Is that the regular published rate of freight for the cotton? A. Yes sir.

Q. How do you know that? [Q.] The tariffs are all filed there for public inspection. Anyone can go there and see. There is no secret about it.

Q. What authority did you have to sign a bill of lading to Utica, New York? A. General instructions.

Q. Has the company held itself out as to being able to carry cotton to Utica? A. I don't question that fact. I simply had

instructions from the railroad company that they had the published rate to Utica. Of course that was sufficient authority to us for signing it.

Q. You didn't question your right at all, on account of these instructions, to be able to issue this bill of lading to Utica, New York? A. No sir.

Q. Did you understand that to have been a kind of traffic arrangements between the different connecting carriers? A. Yes sir.

Q. That was a traffic arrangement between the connecting carriers that authorized you to issue the bill of lading? A. Yes sir, public tariffs.

Q. You notice there is a fire clause in that bill of lading; state whether you had any authority to sign that bill of lading with any of these clauses eliminated,—had you been authorized to sign with this eliminated? A. Why no sir, I was not.

Q. You had no authority to sign a bill of lading with this clause eliminated? A. No sir, without I got instruc-
52 tions from the Dallas office.

Q. You had no such instructions? A. No sir.

Q. If it could have been done, it would have to be done by reason of instructions about cotton? A. Yes sir.

Q. You had no such authority at that time? A. No sir.

Cross-Examination

By Mr. Glass:

Q. You don't know what the traffic arrangements were? A. No sir.

Q. You simply had instructions to give a through bill of lading of the kind you did give? A. Yes sir.

Q. With all those printed stipulations? A. Yes sir.

Q. And fixed the rate at 85 cents? A. Yes sir that is the published rate.

Q. The Texas and Pacific Railway Company does not reach Utica, New York? A. No sir.

Q. Does its line of railroad extend further north than Texarkana? A. No sir, that is right.

Q. This shipment was to go out over the Iron Mountain from Texarkana? A. I suppose this was to go by the Iron Mountain. There is no writing on this bill of lading. The only way I could answer correctly is to see the records.

53 Q. It was burned up before it was billed out? A. Yes sir.

Q. After it left the Iron Mountain it would necessarily have to pass over other connecting roads to reach Utica, New York? A. Yes sir.

Q. At that time there was another rate in force from Texarkana to Utica, New York or to that territory,—a higher rate,

—didn't you look that up last court and find in the published schedule at that time there was a different rate? A. There was a different rate via New Orleans and Lockport. I don't remember the rate.

Q. To refresh your memory, don't you remember you looked up and found that there was an all rail rate from Texarkana to New York about double this 85 cent rate? A. Yes sir, there was a higher rate.

Q. That was published in the schedule at that time? A. Yes sir.

Q. Kept on hands for the inspection of the public? A. Yes sir.

The Court: What do you mean by that?

The Witness: There is a rail and water rate, via Galveston and New York; there is what we call the Gulf Ports rate via Newport News; and an all rail, is literally what it says.

The Court: You say there was an all rail rate from Texarkana to Utica at 90 cents?

The Witness: I don't remember. There was an all rail rate. I will have to look at the tariffs to refresh my memory. The rail and water rate is always less than the all rail rate. I want to say this tariff that the bill of lading is signed upon,—

54 the Texas and Pacific Railway Company is a part of this tariff, however, though, the name may not be there.

[—] That is an all rail shipment? A. Yes sir, and this is the tariff that is used upon this bill of lading,—the 85 cent rate.

The Court: What is the object of this?

Mr. Glass: It is to meet their allegations. We had two rates. They say we had no other rates; but the schedules are open for the public; we did have a regular published higher rate. Really it does not make any difference; but according to Mr. Arnold's idea it does make a difference. They are attacking the stipulation in the bill of lading because they say they were forced to ship at the 85 cent rate, and we deny that.

Q. You have stated that you did not quote that higher rate to any of the shippers. A. I don't pretend to say it was a higher rate, until I see the tariff. My understanding was there was another rate out. I will have, of course to compare the two tariffs to see if they will conflict. There are a good many issues of tariffs, and quite often they conflict.

Q. When this bill of lading was presented to you was there any objection to it? A. No sir.

Q. Did they ask you to strike out any clause in it? A. No sir.

Q. Did they ever object to any clause in it? A. No sir.

Q. Did they send it down in that form? A. Yes sir.

55 Q. All you did was to sign Mr. Hovey's name? A. Yes sir.

Q. The cotton at that time was in the possession of the Union Compress Company,—was it not in the possession of the Union Compress Company? A. I suppose so, yes sir.

Q. And the usual course of business was followed in this case, and when they send the tickets and show that they had delivered these 50 bales of cotton to the compress, you take them up and give them a bill of lading? A. Yes sir.

Q. You made out the usual instructions to the compress company and sent them with the receipts and they took up the receipts and signed the stub? A. Yes sir.

Q. Did they sign a receipt for the cotton or the tickets? A. That is a question. They signed a form,—that would be a question. I only know that when they would send me a receipt the tickets would be surrendered. It is a question of law. I don't know.

Q. What was that receipt; that they had received from you 50 tickets or 50 bales of cotton? A. I think the form is "received ——— bales of cotton". "Tickets" is mentioned below. That is only from memory. I have not been handling them in the last three years.

Q. Then they signed a receipt and sent it back in the book? A. Yes sir, it is a long book in that (indicating) shape, and in the middle it is perforated.

Q. Those are duplicates? A. Yes sir.

56 Q. One is to remain stationary and the other to be torn out? A. Yes sir.

Q. That was to be retained for their information? A. Yes sir.

Q. They receipted to you for the tickets you got from Arthur and Company? A. Yes sir.

Q. Is it not a fact that the railroad Company had no control or management of that cotton until it was loaded on the cars? A. I don't know that. We simply got the receipts from the compress.

Q. I understand, but who compresses the cotton? A. The Compress Company?

Q. Did the railroad company have any direction of it? A. No sir.

Q. Did they have any authority to direct how it should be done? A. No sir.

Q. Did they have any authority to employ or discharge anybody at the compress? A. No sir.

Q. Was the manager of the compress there under the direction or control of the railroad company? A. No sir.

Q. The compress company compressed cotton,—all cotton that came to it for that purpose did they? A. Yes sir.

Q. The form of the dealing was that when the owner of the cotton would put it on the compress platform or in the compress, that the compress company would give him a receipt for it? A. Yes sir, it is customary.

Q. And hold it until he got ready to ship it? A. Yes sir.

Q. Then he would bring those receipts to you if he
57 wanted to ship it over your road and you would give him a bill of lading? A. Yes sir.

Q. And you would send the tickets to the compress company and get a receipt showing that you had delivered him a bill of lading? A. Yes sir.

Q. Whose business was it to see that the Union Compress Company should put it on the cars? A. The Union Compress Company.

Q. When did the railroad company actually receive possession of it? A. When they loaded it in the cars.

Q. Was there any charge made for the handling of the cotton when the receipts were turned over to you? A. No sir.

Q. Did the railroad company have any authority or any control over the employees at the compress company? A. No sir.

Q. Did they ever at any time exercise any control over the compress company in the management of its business? A. If they did I never knew it.

Q. You were the chief clerk for the agent, Mr. Hovey? A. Yes sir.

Q. You handled that cotton proposition? A. Yes sir, I handled it almost all through.

Q. There was no change in the condition of the cotton,—there was nothing done except exchanging a receipt for a bill of lading? A. No sir.

Q. When you got those receipts, and sent them over and got a receipt from the compress company that they had received these tickets for the bales of cotton,—whatever it was,—under the arrangement between the railroad company and
58 the compress company, the compress was under obligations to take out insurance for the benefit of the railroad company? A. Yes sir.

Q. Did the railroad company have anything to do with the handling of the cotton,—did they handle the cotton until it was loaded in the cars? A. No sir, the compress did all that.

Q. The railroad company had no authority and didn't exercise any authority or direct the employees of the compress company how to compress the cotton? A. No sir.

Q. Or where to put it? A. No sir.

Q. Did they have any authority or try to exercise any authority as to the character of building they had? A. No sir. Those matters were always handled in the general office.

Q. Did the railroad company ever undertake to control the compress company? A. No sir.

Q. As to whether it should be an enclosed or open platform, or anything of that kind? A. No sir.

Q. That was a matter that was entirely with the compress company? A. Yes sir.

Re-Examination

By Mr. Arnold:

Q. I handed you a while ago a pamphlet purporting to be the tariff rates for the shipment of cotton from Texarkana and other points to eastern cities. State whether that (indicating) is the pamphlet that was issued by the T. P. Railway
59 Company? A. That was the southwest freight committee, but Texarkana is there, and the Texas & Pacific Railway Company,—each one is there, a special number.

Q. This is the form that is handed to shippers for their information as to rates? A. Yes sir.

Q. Your attention was directed to some other forms. Was that other form sent out to shippers? A. Yes sir, I think the form he has reference to is what they call regular rail rates.

Q. Don't you find that here? A. This is the tariff that was used in this class of business.

Q. Then they had no other tariff rates for cotton except these? A. I think this tariff they have mentioned here has a cotton rate in it that was much higher than the other; but they used always the lowest rate.

Q. Is this the only form of a bill of lading you were authorized to issue? A. That is the,—that is on interstate shipments. Understand me, there is another form for domestic shipments.

Q. You have only three forms of bills of lading? A. Yes sir.

Q. That fire clause is in all? A. Yes,—hold on, I will have to look at the other form to see if that is in that.

Q. The other tariff rate that you referred to,—is that a general freight,—you think there was a cotton rate in there? A. Yes sir.

Q. Did you never use that at any time? A. No sir.

60 Q. You say that the railway company had no control over the cotton at the compress, nor did they have any control of the manner in which it was compressed; but would the compress company undertake to compress it without instructions from the railroad? A. No sir, it is understood when it was placed there and bills of lading issued it was to be compressed. It is the regular procedure.

Q. Who paid for the compression of the cotton? A. The T. P. road.

Q. The cotton company didn't go ahead and compress it for accommodation? A. No sir.

Q. And if there was no control by the railroad of this cotton you wouldn't have gone down there to see about that insurance would you?

Objected to as leading.

Q. You did have an interest in that cotton to the extent of seeing that it was insured? A. Because those were my instructions, yes sir.

Q. You saw the character of the building and surroundings: you say there was no shed over a great deal of that cotton? A. Yes sir.

Q. You knew that there were railroads on three sides of it. A. Yes sir.

Recross Examination

By Mr. Glass:

Q. The compress was compressing cotton for all the railroads? A. Yes sir.

Q. If a person had to take the 85 cent rate on those conditions,—for instance, the fire clause and the right to compress, and demanded that the shipment be made without that, what would you have done? what course would you have pur-
61 sued? A. I would have wired the Dallas office for instructions.

Q. If they had instructed you to ship it under the higher rate without those clauses, you would have done that? A. Whatever they would say.

Q. You had no authority to do anything without getting instructions from headquarters? A. No sir, not in a case of that kind.

(Witness excused)

Mose Wagner, a witness called for the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Arnold:

Q. Where were you working at the time the Union Compress Company was destroyed by fire? A. I was right there.

Q. Were you there when it was burned up? A. Yes sir.

Q. How long had you been working for them? A. I had been working for them I expect twelve or fifteen years.

Q. What part of the work were you doing? A. Cotton tier.

Q. Did you work around the compress? A. Yes sir.

Q. Was the compress running that day? A. No sir.

Q. Had it made a run that year? A. I don't think it had.

Q. Was there much cotton on hand at the time? A. I think they had twelve or thirteen hundred bales on hand.

Q. State whether all that cotton,—what part of it
62 was under the shed of the compress? A. There was hardly any of it under the shed.

Q. State what part of the platform was covered by the shed? A. There was very little covered, only the part where the press was.

Q. The boiler room was covered? A. Yes sir, but that was outside of the compress.

Q. And the press was covered? A. Yes sir.

Q. Was the greater part of the storing platform, where the cotton was kept under cover? A. No sir, on the outside.

Q. On the south side what railroad ran? A. The Cotton Belt and the P. G.

Q. The P. G. was on the west side was it not? A. Yes sir.

Q. And the T. P. had a switch entering from the north side? A. Yes sir.

Q. Who was there. Give me the names of the others? A. Chess Baker, was there. He was the fireman. Jim Murphy. Harry Gaither, aad I think another man named Will Edwards.

Q. Was there anyone by the name of Baker there,—another Baker? A. No sir, there was only one Baker there and myself.

Q. What time did the fire catch? A. As near as I can recollect it was between a quarter of twelve, and half past twelve in the daytime.

Q. What were the boys doing at the time? A. Eating dinner.

Q. The boiler rooms were downstairs? A. Yes sir.

63 Q. What men were down in the boiler rooms? A. I don't remember who were down there just at that time. I think Mr. Edwards said he was in the boiler room when the fire broke out.

Q. You didn't go in there? A. No sir.

Q. Where was Mr. Stati? A. He was in the office.

Q. Is that downstairs? A. No sir, upstairs.

Q. Who was superintendent at that time? A. Mr. West.

Q. Where was he? A. I don't know where he was; gone to dinner, I reckon.

Q. And Stati was in the office? A. Yes sir.

Q. Edwards was in the boiler room? A. Yes sir.

Q. That left you and Chess Baker and Jim Murphy and Harry Gaither upstairs? A. Yes sir.

Q. What part of the building? A. On the workbench on the left side of the compress.

Q. What call or notice was given to allow you to go to dinner? A. They rang a bell at dinner hour.

Q. Who rang that bell? A. The fireman generally rang the bell.

Q. Was the bell rang that day? A. Yes sir.

64 Q. After the bell rang, what trains, if any, passed the compress? A. There was a freight train went on the Cotton Belt, and a P. G. switch engine I think was switching along there about the same time.

Q. You all remained there eating dinner until you noticed the fire? A. Yes sir.

Q. How did you discover it? A. Some of them made a remark that there was a fire at the far end of the building, and hollered fire, and I ran down there and I called to the boys to take out the hose, and I stayed down there until they got the hose stretched out; but after the hose was stretched we couldn't find the nozzle.

Q. What was the effect of not having a nozzle; could you use the hose successfully? A. No sir, we had nothing to force the water.

Q. Where was the nozzle? A. I don't know.

Q. Was it found there? A. I think it was found afterwards.

Q. Was it found in time to do any good,—to help put out the fire? A. No sir.

Q. Do you know who did find it? A. No sir, I don't know who did find it.

Q. There was no night watchman? A. Not that I know of.

Q. After those trains went by was when this fire occurred? A. That is when I discovered it.

[—] Has the fire ever caught there before? A. Yes sir, we had several fires there before.

65 Q. When you noticed the [firt] first what was it in? A. It was in a pile of bagging.

Q. On what part of the platform? A. It was right up there in the little corner.

Q. Was it on the angle between the Cotton Belt and the P. G.? A. Yes sir, down in the far corner of the building.

Q. [What] would be the southwest corner? A. Yes sir.

Q. That was how far from the press where you were sitting? A. I don't know; possibly 40 or 50 yards.

Q. Did you see the fire first? A. No sir.

Q. Who saw it first? A. I think Jim Murphy was the first one that saw it.

Q. What had become of Mr. Stati in the meantime? A. I didn't see him until the fire had got so hot I had to run. I thought I would run around to the office and see if I could get

some of the books; and he was lying down there on the table asleep.

Q. He was the only white man on the place? A. Yes sir.

Q. You found him asleep? A. Yes sir.

Q. Was there any kind of a covering about the premises there that could be thrown over the bales of cotton,—any tarpaulin? A. No sir, there was not a tarpaulin on the place.

Q. The cotton was stacked all around the platform? A. Yes sir.

Q. In the shed and outside the shed? A. Yes sir.

66 Q. It was pretty full of cotton? A. Yes sir.

Q. State whether there were trains passing there all the time, along these several lines of railroad? A. Yes sir.

Q. And switch engines? A. Yes sir.

Q. Did you ever notice any sparks fly from any of them? A. Yes sir.

Q. That pile of bagging: when had that been brought in there? A. I don't know. I think it had been there a week or ten days possibly. We piled it out of the way the same day of the fire.

Q. The first fire that you discovered: where was the fire when you discovered it? A. It was in that pile of bagging.

Q. Was that in bales? A. Yes sir.

Q. Had it been torn loose in any way? A. No sir.

Q. Just stacked up there? A. Yes sir.

Q. Were any of the ends of the bales towards the railroad. A. They were stacked towards the railroad.

Q. Was that ordinary cotton bagging? A. It is what we used to pack cotton.

Q. Was it the same kind of bagging that is used for bales? A. Yes sir, some of it was and some wasn't.

Q. Do you know how long it had been since any of the boys had been around of this side of the platform? A. No sir.

67 Q. You don't know if any of them had been around next to the railroad for quite a while? A. I don't think they had.

Q. You know they didn't go there after that train went by? A. Yes sir, I know they didn't.

Q. They all went to eat dinner? A. Yes sir.

Q. How about the wind: was it blowing? A. It was blowing pretty high.

Q. What direction was it blowing from? A. I call it the southwest.

Q. Was it a dry season? A. Yes sir.

Q. Was it very dry? A. Yes sir.

Cross-Examination

By Mr. Glass:

Q. This cotton bagging was about 40 or 50 yards from where you were sitting? A. 40 or 50.

Q. Do you mean yards or feet? A. Yes sir.

Q. You were sitting about the work bench? A. Yes sir. It was about half way.

Q. There was boxing on the end of the shed and on the side of the shed? It would go down about half way? A. Yes sir.

Q. Was it not stacked on there so you could drag out cotton at any time? A. Yes sir, it may have been.

68 Q. This bagging you say you had had on hands about a week or ten days? A. As near as I can recollect.

Q. It was put up there in the corner of the shed? A. Yes sir.

Q. One of those trains was a freight train on the Cotton Belt and a switch engine on the P. G.? A. A freight train on the Cotton Belt.

Q. Which way was it going? A. West.

Q. Was it puffing? A. No sir, no more than ordinary.

Q. The T. P. Railroad was on the north side of the compress? A. I think so, yes sir.

Q. On the north side? A. Yes sir.

Q. It was on the far side from where the fire started? A. Yes sir.

Q. You didn't see any switch engine or freight train on the T. P.? A. No sir.

Q. If one had gone along there and a spark had blown from it it would have had to go against the wind. It is three or four hundred [feer] from the T. P. track to where this fire started? A. Yes sir.

Q. How long after the fire started before the whole end of the shed was in flames? A. It was not scarcely any time.

Q. How did it burn when it started? A. Very fast.

69 Q. To what extent was [in] burned when they got the hose straightened out? A. I don't know as I can tell you?

Q. About what cotton,—what space did it cover? A. I don't know; it was all over the platform. It was all over.

Q. If they had had the nozzle could they have put the fire out? A. I don't know.

Q. What is your best judgment about it? A. I don't know. It may have done some good if we had had the nozzle.

Q. Didn't the fire spread very rapidly? A. Yes sir.

Q. It spread on the bales very rapidly? A. Yes sir.

And further the witness saith not.

70 George West, a witness called for the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Arnold:

Q. What business were you engaged in on the 17th of September, 1900? A. I was manager for the Union Compress Company.

Q. What business are you engaged in now? A. Manager for the St. Louis Compress Company. They are successors to the Texarkana Compress Company who bought out the interests of the Union Compress Company after the fire.

Q. The Union Compress Company has not been in business for several years? A. No sir.

Q. Since the fire? A. No sir.

Q. It has been succeeded by two companies since that time? A. Yes sir.

Q. Do you know about these fifty bales of cotton for which this bill of lading was issued to W. A. Arthur & Co.? A. I have no distinct recollection of it. I know about the case. I would not remember the marks of that particular lot right now.

Q. You know about the 50 bale shipment that was ordered out by the T. P. railway company that was ordered to be shipped on account of Arthur & Company? A. Yes sir.

Q. State what the Texas & Pacific did with reference to that cotton and what instructions they gave you? A. The instructions we got from the Railroad company,—it is in the printed form, that is a duplicate form,—a stub form.

71 They issued the instructions to us in duplicate. The bottom of this duplicate we retain for our information and instructions as given by the railroad company and we acknowledged receipt of the cotton and those instructions on the stub to the railroad company.

Q. You gave the railroad company a receipt for 50 bales of cotton? A. The way I understand it, yes sir.

Q. That is, you give your receipt to them when they surrender the original cotton checks,—they were turned over? A. Yes sir, we didn't give the receipt until we got those instructions accompanied by the compress [receiptw] at that time.

Q. Does the railway company instruct you to compress the cotton or is that a general standing order that you are to compress it when they bring those receipts there. At that time. A. I don't think our forms read "compress and ship". I think at that time they merely said "ship". The present form reads "compress and ship for ...." on account of whichever road it is orders the cotton out.

The Court: This cotton that is now being sued for was shipped in there to the compress company?

The Witness: It was shipped in there by the various railroads.

The Court: I am talking about this particular cotton: it was not shipped in there by the compress company to the credit of the plaintiffs in this suit?

The Witness: It was shipped, and brought in there by wagons.

The Court: I want to know, while it remained in there, if you had instructions from anybody to compress it?

72 The Witness: Not until we got instructions from the railroad people.

Q. You don't compress for anybody but the railroad company? A. No sir.

Q. The owners don't pay you? A. No sir,—that is, our settlements are made with the railroad company.

Q. How much do they pay you for compressing? A. We get 10 cents a hundred pounds.

Q. Does that cover the handling charges? A. It covers everything. We are supposed to unload it, load it and do all the handling.

The Court: Unload, compress and reload?

The Witness: Yes sir.

Q. What do you do in regard to the insurance on the cotton? A. We carry a line of insurance at all times. That is, we are supposed to carry, and requested to carry by the railroads a sufficient amount of insurance to cover our liability to the various railroad [companied].

The Court: Who pays for that?

The Witness: We do.

Q. The policies are delivered to the railroad company? A. The policies at that time were issued on account of T. P. Railway company and were delivered to the T. P. Railway Company individually.

Q. In other words, you took out a policy for the T. P. Railroad and turned it over to them? A. Yes sir, at that time.

Q. I will ask you now to examine this little diagram

73 I show you and state whether that is a rough diagram of the compress platforms as they were before the fire?

A. (Examining diagram) Yes sir, that is a very fair diagram.

Q. I will ask you to explain what railroad ran on the west?

A. The west side is the Cotton Belt.

Q. On this side? A. I am not very well familiar with the points of the compass down there. I would call the west side the Cotton Belt, while it may be the other side actually.

Mr. Glass: The Cotton Belt is on the south side.
Mr. Arnold: The P. G. is the west side.
Mr. Glass: Yes sir.

Q. On this side from here towards Texas is where the P. G. runs by, running south? A. Yes sir.
Q. The Cotton Belt is on this side (indicating) of it, and runs down into Texas? A. East and west, I suppose it is.
Q. The T. P. has a switch? A. Yes sir.

The Court: That runs east and west also?
The Witness: Yes sir.

Q. Three sides of it is bounded by railroads. A. Yes sir, was at that time.
Q. State what, your estimate, is of the length of the compress platform on the west side? A. On the west side at that time I suppose it was about 350 or 400 feet long.
Q. On the Cotton Belt side about how long was it over there? A. I think that was between four and six hundred and that is figuring this little spur (indicating).
74 Q. Did you store cotton on the spur? A. Yes sir at times when we were crowded, though I don't think there was any there at that time.
Q. How long was it on this side (indicating) down to the spur? A. I expect that was about 350 or 400, on the T. P. side.
Q. On the T. P. side what was the length? A. It was the same as the Cotton Belt side.
Q. With reference to the boiler house and the press, state whether they were located near the center of the platform? A. The boiler house was off from the main platform, but the press was about the center of the platform.
Q. You mean the boiler rooms were on beyond on the platform? A. Yes sir, they were connected but they were a separate apartment.
Q. What kind of a shed was there there for covering the cotton that was stored there? A. It was what we call a drop side shed; we had a corrugated iron roof. The siding extended to within six or seven feet I think of the floor. It was open all around with the exception of one place about the middle of the shed which was closed in.
Q. What was the character of the roof? A. It was corrugated iron.
Q. It was drop side all around down to within about six feet of the platform? A. I expect it was nearly seven.
Q. It was open all around? A. Yes sir with the exception of one place that was about twenty feet.

Q. What was the size of that shed? [—] I expect that was about 100 by 250,—100 by 200 possibly. feet

75 Q. That would not then cover much more than one-fourth of your platform? A. Figuring in all the platform I don't think it covered more than a quarter of it. It may have been possibly. I am not positive about that.

Q. How many fire plugs were there there? A. Two, at that time.

Q. There were two places where you had a hose and fire plugs? A. Yes sir, there was a small hydrant. There was one there on the place,—a 3/4 inch plug used right by the press for drinking water and we had a hose attached to it as a fire protection also.

Q. What was the length of that hose? A. That small hose?

Q. All of them. A. I think it would be about 600 feet at that time.

Q. You had them attached to the plug? A. Yes sir.

Q. How much would each one be? A. I think there was about 150 feet attached to each plug at that time. Three sections of fifty feet each.

Q. Does the diagram correctly represent the place where these fire plugs are? A. Yes sir, as near as I can figure.

Q. About how far apart were those plugs? A. They are about 140 feet apart I think,—those two (indicating).

Q. That compress has been rebuilt, has it? A. Yes sir, a compress has been built on that location. The building and platform are quite different from what the other was.

Q. Had there been fires there before that had been successfully put out? A. Yes sir.

76 Q. Were there several of them? A. Yes sir, there were quite a good many for a year after I first came down here.

Q. State whether you made any complaint to the company that you represent, in regard to insufficient protection?

Objected to as not being binding upon the Texas & Pacific Railway Company.

Mr. Arnold: It is for the purpose of showing it was unsafe.

Q. I will ask you then, whether this was a safe place?

Objected to as calling for a conclusion.

The Court: That is a conclusion.

Q. What was it you called on your company for, to supply, if anything; and state whether it was necessary. A. In what respect?

Q. About providing against fire. Did you make any request of the company for any additional protection,—for sheds or things of that kind? A. I had never spoken to them about the danger of fires from that particular point. I think that particular location is a little bit more dangerous than quite a number of other compresses on account of the proximity of the railroads there.

Q. In order to have any sort of protection against sparks of engines was it not necessary to have a larger shed, or was it?

Objected to. Objection sustained.

Q. What was necessary, if anything, to make it a reasonably safe place? A. There were lots of things. The shed could have been enlarged and more hydrants could have been placed.

Q. What about the enclosure of the shed? A. The
77 enclosure of the shed as it stood then?

Q. Yes sir. A. I don't think it could have added a bit to it.

Q. Why? A. Because there was cotton on the open platform at all times that would be much nearer exposure from fires from the engines than that cotton could possibly have been on the shed and at all times the cotton would have been exposed to the railroads.

Q. In other words, could you not remodel that shed so as to help the situation? A. I don't think it would.

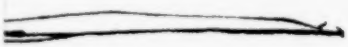
Q. It would have been necessary to have a larger shed? A. Yes sir.

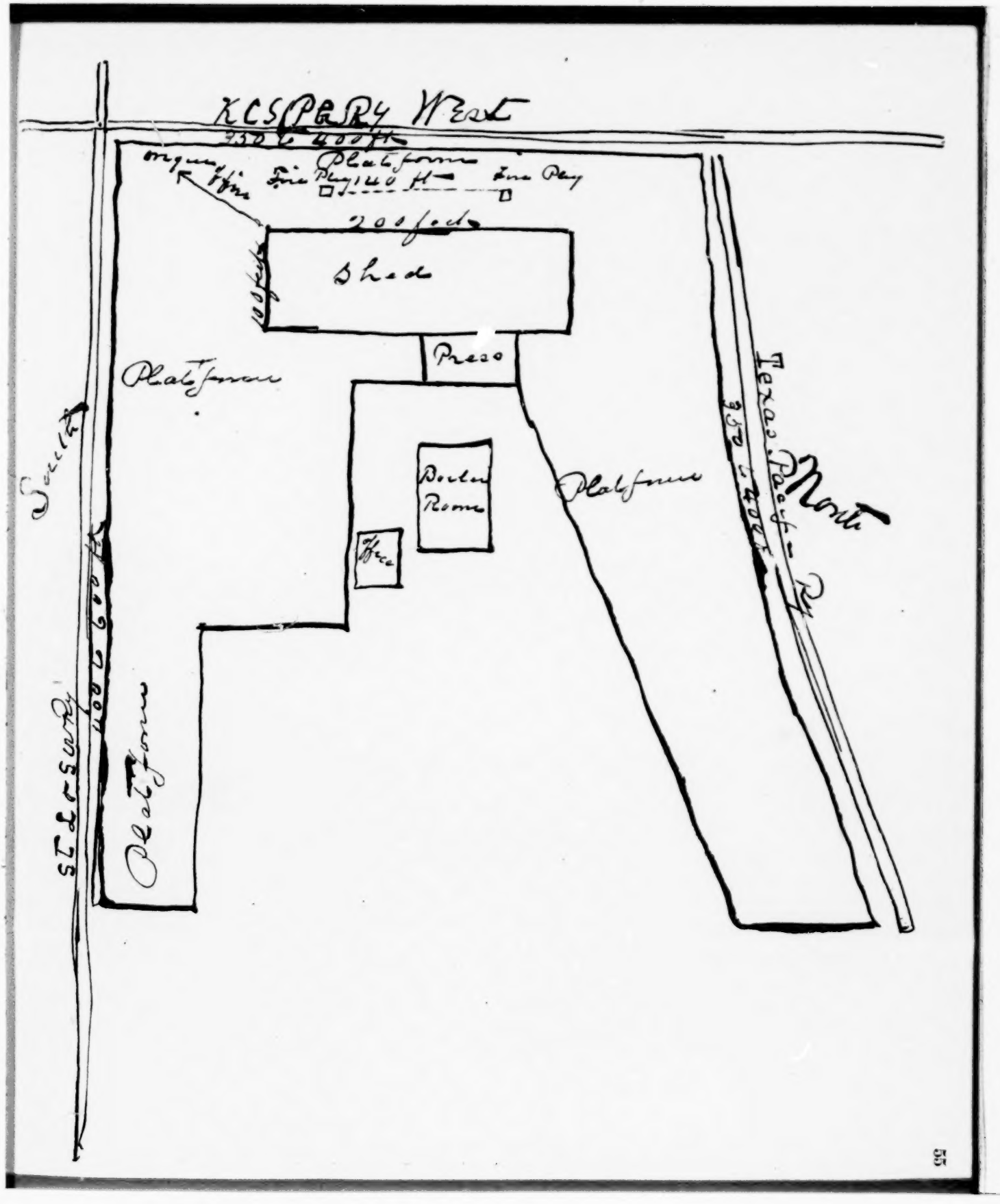
Q. Were you there on the day the fire occurred? A. Yes sir, I was there on the day the fire occurred.

Q. Were you there when the fire occurred? A. Not when it started.

Q. Where were you? A. I was home at dinner.

Thereupon a diagram of the compress platform was introduced in evidence which is as follows:




KCS PG&SRy West
330 & 400 ft
Platform
Fire Plug
140 ft
Fire Plug
200 feet
Shed
Press
Platform
Boiler Room
Office
Platform
Platform
Texas & Pacific Ry
330 & 400 ft
Vacant
Ramsey St
Platform

78 Cross-Examination

By Mr. Glass:

Q. Who were you employed by? A. By the Union Compress Company.

Q. From whom did you receive instructions as to the manner of running the compress and handling the cotton? A. The general instructions were received from the compress company.

Q. Where were the general offices of the compress company? A. At Little Rock.

Q. Did they have a compress at Little Rock, and Texarkana also? A. Yes sir.

Q. Who paid you for your services as manager of the compress company? A. The compress company.

Q. When you speak of getting the compress from the railroad, that was paid you at 10 cents a hundred pounds for compressing the cotton, and that was paid to the compress was it? A. It was paid to the compress company through me.

Q. The Union Compress Company was an incorporated concern? A. Yes sir.

Q. And you were placed here in charge? A. Yes sir.

Q. You received all your instructions from and made all your reports to the compress company? A. I did general instructions. There might be some instructions I received from the railroad company,—as to how their cotton should be shipped.

Q. I understand that you got instructions from them as to in which particular cars,— A. And the general direction in which they wanted it to go.

79 Q. In building that compress did the railroad have anything to do with the kind of compress it built? A. I don't know, sir, I was not there.

Q. In storing the cotton and putting it in any particular part of the platform the railroad company had no verbal direction? A. No sir.

Q. The railroad company had no cotton at all,—no employ of the railroad company handled any cotton after it was put in the press until it was put back on the cars? A. I am not positive about that. After one season the T. P. and the Iron Mountain railroad got a joint check clerk of their own,—whether it was during that particular season,—I don't think it was that year.

Q. Reflect a moment and see if you don't know it was not that year? A. I am not positive that was the season. They got a man there one year.

Q. The check clerk is a man that stands there and checks the cotton in and out of the cars to see that the right number

of bales goes in and comes out? A. Yes sir, and otherwise see that the instructions of the railroad company to the compress are carried out.

Q. You spoke about instructions: do you mean instructions about what cars to load it in and where to ship it? A. Yes sir.

Q. You never received any instructions from the railroad company as to how to compress it? A. We have received instructions as to how to compress it. For instance, a shipment going to Japan, we were instructed to put so many bands on that cotton. We are also bound by the commission or maritime association.

80 Q. I am not asking you about the maritime association. A. I don't know whether it was from the railroad company. I had an understanding with them to put a certain density before it would be accepted by them.

Q. Ain't it a fact that they simply told you that they wanted the cotton compressed in a certain way, and if you didn't use your own judgment about how to do it and how many men you employed,— A. Of course that goes back to that other question.

Q. Why do you want to argue with me, Mr. West? A. I am trying to explain.

Q. I am asking you if it is not a fact that the manner of handling the cotton, and the number of men you used, and the machinery,—if you are not entirely independent of the railway company in that? A. Yes sir.

Q. As to the density of the cotton, and the number of bands they want, that is an agreement you make with the railroad company that you will put it up in that shape? A. Yes sir.

Q. After the cotton reaches your platform you handle it yourself, and compress it yourself, and at that time you delivered the cotton on to the cars of the company? A. Yes sir, as per their request.

Q. And all the labor that went to do that was paid for by the compress company? A. Yes sir.

Q. And was so controlled and managed by you? A. Yes sir.

Q. And the railroad company has no control over the labor? A. No sir.

81 Q. The railroad company had no control over the number of hydrants you were to have? A. No sir, not that I know of.

Q. Don't you know that they didn't? A. They never exhibited any authority to me.

Q. If they had told you to put in another hydrant you would not have done that without instructions from your office? A. No sir.

Q. So far as handling the cotton and compressing, and protections as to fire, you did all that independent of the railroad company? A. Yes sir.

Q. And you wouldn't have received instructions from the railroad? A. No sir.

Q. You would have applied to the superior officers of your company? A. Yes sir.

Q. In other words, then, as manager of the compress, you got your instructions from the compress company? A. Yes sir.

Q. Do you know anything about what the arrangements were with the railroads? A. No sir.

Q. The compress company was erected down there after the three railroads were built? A. I think before the P. G. was built. The P. G. was built last. I think the P. G. came after they were in there.

Q. The compress company selected the location? A. Yes sir.

Q. Bought and paid for the land? A. I think they
82 did, though I was not here at that time.

Q. The compress company owned the land on which the compress was erected? A. At that time I think they did.

Q. The railroad company never owned it. It never belonged to the railroad company? A. I don't know.

Q. I mean while you have been here did you ever have a lease from the railroad company? A. No sir.

Q. And the compress company selected its own site for locating the compress, so far as you know? A. Yes sir.

Q. You was not here at that time? A. No sir.

Q. I will direct your attention now, at that time and before that time to other compress companies that you were connected with, and the fact that they had large open platforms close to railroad companies,—were you connected with these that had open platforms next to railroads,—how was it at that time,—1900,—that is over three years ago?

Objected to.

The Court: Are you familiar with other compress companies?

The Witness: I had been working at Little Rock, Arkansas, when I came here, and managed the East Little Rock plant then, and had worked on the other side and in about the Hope plant and the Newport plant, as I was going to explain to Mr. Glass,—and the railroads at this point made it little more hazardous.

83 The Court: I am asking you if other compress companies that you are familiar with at other places, didn't

have open platforms upon which they stored their cotton, and located upon railroads?

The Witness: They did.

Mr. Glass: Do you mean to make it appear that they were negligent in handling business over there?

The Witness: I do not intend to convey that idea.

Mr. Glass: I thought you were trying to make it appear that the compress company were grossly negligent in managing that business over there?

The Witness: I do not intend to.

Re-Examination

By Mr. Arnold:

Q. You started to make some explanation with reference to the location of this compress with reference to railroads. Do you know of any compress that was so much exposed as this one? A. In what way?

Q. By fire.

The Court: From the railroads.

The Witness: I think that the proximity of the P. G. railroad and the Cotton Belt, in connection with this plant, makes it a little more hazardous than the usual run of compresses, unless they are usually situated as closely to the main lines as this one is.

Q. In this case there are railroads on three sides of it? A. Yes sir.

Q. With reference to the compress at little Rock: how did that compress at Little Rock compare with this one here?

84 A. The compress at Little Rock was protected better in every way.

Q. Explain to the jury in what ways it was protected. A. It was not as near to any main line of railroad. It was not as near to as many lines. The old Union Compress company's building at Little Rock had a brick fire wall on the platform close to the only main line of a railroad which passed there, and was not over twenty feet wide, I should not think, the open platform at that plant.

Q. What was the width of the platform around this place,—this compress here in Texarkana? A. On the P. G. side I think it must have been about sixty feet of open platform between the shed and the sidetrack, and on the Cotton Belt, I expect it was 60 or 75. On the T. P. it averaged,—and that is figuring to the side track,—I expect it averaged on the T. P. from 60 to 100.

Q. All those platforms around this little shed ranged from 60 to 100 feet all the way round,—they were not enclosed? A. No sir.

Q. It was not covered with the shed? A. No sir.

Q. It was close to the railroad? A. Next to the sidetrack, yes sir.

Q. How did that compare with the compress at Shreveport? A. I have never seen that compress,—that is, I have never gone there,—I never made a personal inspection of any compress in Shreveport.

Q. Did you assist in rebuilding the compress here? A. Yes sir.

Q. State how that was built in reference to sheds?

Objected to. Objection sustained.

85 Q. Do you know about how the compress at Fort Smith is? A. No sir, I have never seen it.

Q. How did it compare to the compress at Hope with reference to sheds?

Mr. Glass: At that time.

The Witness: I don't know about the character of the Hope compress,—that is of the sheds proper. The railroads were not as close to that compress.

Q. The railroads were only on one side at Hope? A. Yes sir.

Q. What about the one at Newport? A. There were two compresses there at that time. I don't know the distances there, and I could not answer.

Q. Compare this compress down here with those others that you mention; which was the most hazardous and which was the best protected,—whether this or the others? A. I think either of the others were. That is, I mean, by the main lines of these three railroads. I don't think they had better fire protection than we did.

Q. You mean to say that the exposure here was greater? A. Yes sir.

Q. Mr. Glass asked you whether the railway company had any control of the cotton on your platform. State whether the agent of the railway company came down there at times to check up and see how things were getting along,—Mr. Buron? A. The agents sometimes came down themselves, and sometimes they sent their representatives down there to find out and dictate to us as to whether we had enough insurance or not.

Q. Would you meet their propositions on the matter of insurance whenever they demanded it? A. We almost always did, yes sir.

86 Q. Was Mr. Buron down there a few days before this fire occurred and asked for the insurance, and you gave it to him? A. I think Mr. Buron, a little before this fire, asked for some additional insurance, which we procured.

Questions by Mr. Glass:

Q. That is the only matter he ever came down there in regard to,—to see whether or not you were carrying out your agreement about the insurance? A. And the loading of the cotton.

Q. You had to have instructions from the railroad as to how to put the cotton in the cars? A. Yes sir.

Q. You would have been entirely at sea if you hadn't gotten them? A. Yes sir.

Q. The matter of keeping up the insurance was the only instruction you received from the railroad company? A. Yes sir, only general instructions.

Q. Do you know how those insurance policies,—that was an agreement you had with the railroad companies, that in consideration of ten cents a hundred paid for compressing the cotton, that you would [ptotect] them against the legal liability for fire, wasn't it?

Objected to.

The Court: Do you know what this agreement between the railroad company and the insurance company was?

The Witness: No sir.

Q. Do you know where this compress was before being removed to where it was burned? A. I know about. I don't know exactly.

87 Q. Was it in Arkansas? A. Yes sir, just on the Arkansas side.

Q. Just on one road? A. Yes sir.

Q. Was not the object in removing it from Arkansas to Texas to get it on three lines of road? A. I don't know, I was not here at the time it was moved out.

Mr. Arnold: How much cotton was destroyed there? A. I think it was between eleven and twelve or thirteen hundred bales on the platform at that time.

And further witness saith not.

88 Chess Baker, a witness called for the plaintiffs, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Arnold:

Q. Where were you at work on the 19th of September, 1900, at the time the compress was burned? A. I was working there at the compress.

Q. What were you working at there? A. I was pulling levers.

Q. What do you mean by that? A. Engineer at that time.

Q. What time of day did that fire occur? A. Right at 12 o'clock. It may have been a few minutes later than 12 o'clock.

Q. Had the boys quit work for dinner? A. Yes sir. Just had quit.

Q. What did you do when you quit? A. I went in and rang the bell, and the four of us met in the center of the building and commenced eating dinner.

Q. That was right at the press? A. Yes sir.

The Court: How far from where the fire broke out?

The Witness: That was down in the lower end of the building. It was 100 feet, maybe more or less. That was in the southwest corner.

Q. Where did you notice the fire first? A. Jim Murphy asked, "where was that fire." Mose Wagner looked up and said "yes" and me and Harry Gaither went to the hose; and there was a barrel—

Q. What did you do with the hose? A. We strung the hose out and tried to stop it, but the fire got away with us.

89 Q. What was the matter with the hose? A. The nozzle was off the hose. It failed us a few minutes.

Q. How far was it there, out beyond, where the other plug was? A. Yes sir. Right opposite the lower plug.

Q. Where was the nozzle lying when it was found? A. In the frame of the press, on the shed.

Q. How did you happen to know it was there? A. I happened to know it was there. In the morning we had been washing out the boilers and I saw it there, and made for the nozzle.

Q. You couldn't use the hose, then until you got down below the other plug and found it? A. No sir.

Q. Then you got back and screwed it on? A. Yes sir.

Q. All that time you couldn't do much? A. No sir.

Q. Did you notice any trains going by when you were eating dinner? A. Yes sir. There was one went south on the Cotton Belt, right on a grade.

Q. Was there any puffing? A. Yes sir. It was a pretty heavy load.

Q. You noticed that, did you? A. Yes sir.

Q. Did you notice, did you ever notice any sparks fly from the engines as they went by? A. I don't think I did that day; but I have at day and night too.

Q. You all heard that train going back, didn't you? A. Yes, sir, we seen it.

Q. Was the cotton piled up in rows on rows between you and the place where the fire broke out? A. I believe there was some on the east side of the building.

90 Q. Where was most of the cotton, under the shed, or on the platform? A. I could not tell you. I know we had a days run in behind the press when we sat down for dinner.

Q. Did you notice a train go by on the P. G.? A. No sir. I did not notice I noticed a switching engine switching down there about 12.

Q. You kept on eating dinner until you saw the fire? A. Yes sir.

Q. Mr. Statire was the only white man on the ground? A. Yes sir.

Q. Where was he? A. He left me somewheres about half past 11 and told me he would go to the office and eat his dinner, and I never seen him any more till after the fire burned.

Q. He did not get there soon enough to make any directions? A. No sir. He did not. He might have been out.

Q. You don't know whether he was asleep? A. No sir.

Q. Mr. West had gone to dinner? A. Yes sir. He told me just before he left to have everything in shape.

Q. Was it anybody else's business to go around looking after those trains passed? A. I don't know, sir. I had no directions.

Q. None of you boys had any notice to go around and look after the trains passed. A. No sir. I had not. We did not have much time to go around.

Q. When you got hold of the hose the nozzle was gone? A. Yes sir.

The Court: What train was it passed on the road?

The Witness: The Cotton Belt.

91 Cross-Examination

By Mr. Glass:

Q. That is the St. Louis, Southwestern? A. Yes sir.

[A.] You did not see any train on the T. P. A. No sir.

Q. The wind was blowing from the south. A. Yes sir.

Q. A heavy wind? A. Yes sir. Very heavy.

Q. When the train passed on the Cotton Belt, was it pulling heavily—a big black smoke? A. Yes sir.

Q. When the smoke cleared away what did you see? A. We was sitting there. I don't know how long before the smoke cleared away.

Q. What did you discover? A. We never discovered the fire till Jim Murphy spoke.

Q. How much was it burned when you discovered it? A. I couldn't tell you. It was behind a big bale of bagging, and it got up even with the batch before I seen it.

Q. You mean by the "batch" the bale of bagging? A. There was a piece of bagging got out from the bales.

Q. And the fire had gotten up above that before you discovered it? A. Yes sir. On one corner.

Q. Did the wind blow it, and spread the fire very quickly? A. Yes sir. It spread as fast as you ever seen anything.

Q. If you had had the nozzle you could not have put the fire out. A. No sir, I don't think we could.

Q. The wind was high, and it was dry there and it went very fast? A. Yes sir.

92 Q. The T. & P. was north of that? A. Yes sir. It was northwest of that.

Q. The switch engine you saw about 12 was on the K. C. Southern? A. Yes sir.

Q. Not on the T. & P.? A. No sir.

Re-Examination

By Mr. Arnold:

Q. Did that switch engine go past after you commenced to eat dinner? A. I could not say. I could not say for sure.

Q. You might have put that fire out if the nozzle had been there? A. I couldn't say whether you could or not.

Q. You were willing to try it? A. Yes sir.

Q. But you did not have it there to use so you could operate it? A. No sir.

And further the witness saith not.

93 F. W. Offenhauser, a witness called for the plaintiffs, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Arnold:

Q. In what business are you engaged? A. Insurance.

Q. Whereabouts? A. Texarkana.

Q. How long have you been engaged in that business? A. 22 years.

Q. Here in this town? A. Yes sir.

Q. State whether your agency issued any insurance policies on the cotton on the Union Compress Co's platform on September 15th, 1900, for the Texas & Pacific Railway Co.? A. Yes sir. We issued both these (indicating) policies.

Mr. Glass: What is the date of that?

The Witness: September 15th, 1900.

Q. Are those slips that you have there attached to what is called the "standard" form of policy? A. These are slips we

attach to policies called commercial cotton, and these policies cover the liability of the railway company.

Q. In what companies were those policies, and for what amount? A. One of them was in the New York Underwriter's Agency—

Mr. Glass: I want to make an objection to this testimony on the ground that it is immaterial as to whether they had any insurance. I think it is immaterial to the issues in this case. The issue in this case is whether or not the railroad company negligently burned this cotton, or whether it's agent negligently burned it; and the fact of their having insurance of this character, and this amount, I do not think proves, or tends to prove any issue in this case. This identical question has been before the Supreme Court of the state with the compress company that burned at Little Rock, and it was
94 there shown that we have identically the same system of dealing with the railroads as has been proven here—

The Court: For the present, I will let the evidence go in over the objection, and you can renew the objection at a later period.

Defendant excepted.

The witness (Continuing)—for $5000.00 and another is in the Hartford for $5000.00.

Q. When did this insurance begin, and when did it end? A. They both began September 15th, for a period of six months, and expired March 15th, 1901.

Q. What did those policies cover? A. (Reading) On cotton in bales for which bills of lading have been issued by their duly authorized agents and for which they shall be legally liable for loss or damage by fire or contained on the compress platforms and in cars on switches adjacent thereto, situate in Texarkana, Texas.

The Court: Is this the original policy itself?

The Witness: No sir. It is simply a sample of it.

Q. That is attached to one of these standard forms of policies as a paster? A. That simply describes the property it covers. It is pasted on the standard form of policy we use.

Q. Do you know the numbers of these policies? A. The Underwriter's is 56-9-36, the other is 18481 in the Hartford.

The defendant here waived the production of the
95 original insurance policies issued by the Hartford Fire Insurance Co, and the New York Underwriters' Agency, but agreed that copies of said policies might be read in evidence subject to the objection of relevancy and materiality, and thereupon said policies were read in evidence. It is

deemed unnecessary to copy said policies in full. The New York Writers' policy was issued Sept. 15, 1900, and expired March 15, 1901; the policy of Hartford Fire Insurance Co. was issued September 15 1900 and expired May 15 1901 each of said policies was for the sum of $5,000, and were written "on cotton in bales for which bills of lading have been issued by their Ry Company duly authorized agents, and for which they shall be legally liable for loss or damage by fire while contained on Compress platforms and in cars on switches adjacent thereto situated in Texarkana Texas".

96 Cross-Examination,

By Mr. Glass:

Q. This insurance was taken out and paid for by the Union Compress Company. A. Yes sir.

Q. You read one of the slips there, and it says that it insures the railroad company for so much money on cotton in bales—insures the railroad company against their legal liability for loss by fire. If you had insured them absolutely, without saying anything about their legal liability, would there be a difference? A. We don't insure them that way. That is the only form we use.

Q. The only insurance, then, that you write for the compress company for the benefit of the railroad was insuring the railroad against—if it was legally liable, the insurance company was liable to the railroad company. A. Yes sir.

Q. And if the railroad company was not legally liable, the insurance company was not liable. A. Yes sir.

Q. That is your understanding? A. Yes sir.

Re-Examination

By Mr. Arnold:

Q. Was this particular compress classed by you as extra hazardous?

Objected to. Sustained.

Q. These policies were delivered to the Texas & Pacific Railway Co. A. Delivered to the agent, yes sir.

And further the witness saith not.

Mr. Arnold: With the understanding that I can introduce Mr. Gaither, I will rest here, and they can go ahead with their evidence.

The Court: Is that satisfactory, Mr. Glass?

Mr. Glass: Yes sir.

97 The court. You may proceed.

R. B. Ayres, a witness called for the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Glass:

Q. You live here? A. Yes sir.

Q. Are you connected with the Texas & Pacific Railway Co? A. Yes sir.

Q. In what capacity? A. Division superintendent.

Q. You have been connected with the Texas & Pacific Railway Co. at Texarkana, how long? A. 17 years.

Q. Do you know where the Union Compress was formerly located in Texarkana? A. Yes sir. I know about where it was located. I don't know exactly the location.

Q. About where was it? A. It was over in Arkansas on the Iron Mountain tracks—

Mr. Arnold: The proof shows that the ground upon which it was located did not belong to the railroad company, and shows they did not have anything to do with the location of it.

The Court: You are now inquiring about a compress that did not have this cotton on when it was destroyed?

Mr. Glass: We want to show that they had the compress over there on one railroad, and the compress company, for their own benefit, and their own convenience, moved it down to where they could get it on the tracks of three railroads; they selected it themselves.

98 [—] There is no objection to it, proceed.

Q. In your business in 1900 and for several years prior to it, did you travel out over the lines of the different railroads running into Texarkana. A. I travelled a good deal over our own line.

Q. Were there any compresses located upon your own line? A. Yes sir. Quite a number.

Q. Up to that time how were they, open or inclosed? A. I never saw a compress inclosed, that is, the entire platform, either then, or since.

The Court: What do you mean by "inclosed"?

Mr. Glass: A roof over it, and the sides inclosed.

Q. You say none of the compresses you observed did that? A. I have not seen a compress that was inclosed entirely. Of course I have seen them like this, and all other compresses, where the machinery is in an inclosure and covered over, but I never saw the entire platform of any compress inclosed.

Q. How were they with reference to the amount of open space that was on this platform down there, as to the comparative amount of space that was outside, and under the shed: how does that compare with other compresses that you noticed? A. I don't think there was as much exposure here as there was in Paris.

Q. Did the railroad company, at any time, own the land upon which the compress was located when it was destroyed? A. No sir.

Q State whether or not the railroad company had any say-so in building that compress. A. No, so far as I know.

Q. In handling the cotton in 1900, who was in charge of the operating department and the mantainance of the T. &
99 P. Railway at Texarkana? A. I had charge of one division coming in to Texarkana, and I had charge of the Texarkana end of the other division.

Q. The road at that time branched some distance out? A. Yes sir. We had only one line here.

Q. You had control of the entire line in Texarkana? A. Yes sir.

Q. In managing the business did the Texas & Pacific Railway Co. have any control over the compress company in the manner of doing its work? A. No sir; not any [durther] than to state what cars should be loaded.

Q. No further than to give instructions as to what cars should be used? A. Yes sir.

Q. When the cotton was put there on the platform, did the railroad have any control or management as to what part of the platform it should be placed on? A. No sir.

Q. After the cotton was placed on the platform of the compress company, between that time and the time it was packed on the cars, did the railroad company have any control of it? A. No sir.

Q. Did the railroad company have any control or management over the kind of fire protection they should have, or the number of plugs, the amount of hose and things like that? A. No sir.

Q. Did you ever undertake to exercise any control of that kind? A. No sir.

Q. Did the railroad company have any control over the character of the building, or platform, that they were using? A. No sir.

100 Q. Did the railroad company have any kind of control or management of the cotton, in handling it and caring for it, from the time it was put on the platform until it was packed in the car? A. No sir, not in the handling of it, or caring for it.

Q. Who was that done by? A. By the compress people.

Q. Were they in the employ of the railroad company? A. No sir.

Q. Do you know what the railroad paid for compressing the cotton? A. Ten cents per hundred, I believe.

Q. You say the only directions they would give the compress company were which cars to put the cotton in: who loaded the cotton on the cars? A. The compress people.

Q. Who paid for loading it? A. The compress people.

Q. The railroad company had nothing to do with it until it was put on the cars? A. Yes sir. We had nothing to do with paying for loading here.

Q. Did you have anything to do with directing the work in loading? A. No sir, not further than I stated, I gave—

Q. Instructions as to what cars you wanted the cotton placed in?

Cross-Examination

By Mr. Arnold:

Q. Did the Texas & Pacific Railway Company have any contract with the compress company? A. Not that I know of.

Q. Didn't they have some kind of an understanding? A. I don't know that they did, other than the cotton was to go there to be compressed.

Q. What was that? A. There was no understanding that I know of, at all.

101 Q. Did you have any understanding that they would compress the cotton for the railroad? A. I am not sure. I could not explain it, only that all the cotton was compressed somewheres. Cotton was concentrated here. All the cotton that was concentrated on the platform was compressed.

Q. Do you mean to say that the compress company would compress it without instructions from the railroad company? A. They would not compress any cotton, I presume, until shipping instructions had been given.

Q. Who would give those instructions? A. The agent.

Q. The agent of the railroad? A. Yes sir.

Q. Then the agent would give instructions to the company to compress it? A. No sir. He would simply give instructions to ship a certain number of bales under certain marks?

Q. Then, if they followed the ordinary course, they would put the cotton into the cars without compressing it—why did the compress company compress the cotton? A. I am sure I don't know of any agreement.

Q. Why did the compress people compress the cotton if the railroad company did not direct the compression of it? A. It was an understood thing that the railroad would pay for the compression of the cotton.

Q. Then there was an understanding? A. I presume there was. I don't know of any.

Q. Then, you know there was an understanding that the cotton was to be compressed by the compress company, and the railroad was to pay for it? A. I don't know anything of that

kind. That would be a matter for the traffic department to handle, and if they had a contract, I don't know it.

102 Q. You have testified, and endeavored to show that there was no control, or management of that kind; yet, you show now that you don't know anything about it. A. I don't know anything about it.

Q. You did not have anything to do with it? A. I had, in some particulars.

Q. The traffic department had to do with the contract with the compress people, if there was one. A. They may have, if there was one. It was not made through the transportation department.

Q. You don't know what the relation was that existed between the companies? A. I don't know that there was any contract existing between the two companies. I know there was none made through the transportation department.

Q. You don't know whether there was any understanding, of any kind between the two companies? A. No sir. There was none through the transportation department.

Q. Did the transportation department pay for the compression of the cotton, or was that paid for through any other department? A. It was paid through the auditing department, I presume.

Q. Your department would have nothing to do with the directions? A. They would, in shipping out the cotton.

Q. How about shipping it in? A. We handled it in.

Q. You know about the bringing in of the cotton, and shiping it out, but you don't know anything about what directions were given to the compress company after it got there? A. No sir. Not unless they came through my department.

Q. There was no understanding, so far as you know, between the compress company and the railroad? A. No sir.

Q. But you say the compress company compressed
103 the cotton, and the railroad paid for it? A. Yes sir.

Q. You do know that the compress company carried the insurance. A. I have understood they did. I don't know anything about it.

Q. Did you ever examine the compresses round about the country? A. Not particularly.

Q. Would you know anything more about them than you would see in riding on trains? A. Yes sir. I have been through them some little.

Q. Did you ever know the Little Rock compress? A. No sir.

Q. The Shreveport compress? A. No sir.

Q. Did you ever go to this one here and make a critical examination of it? A. No sir.

Q. Have you ever been there? A. Yes sir. I have been there once.

Q. Do you know how much space was left there without any cover over it at all, around the sides of the platform on the roads? A. You mean the ordinary compress?

Q. No sir, on each one. A. I judge it was about the same as it was in that.

Q. About how much was it? A. I suppose it was about 60 to 75 feet on this side—on the T. P. side, of exposed platform.

Q. Was it that much at that time, or now? A. I think it must be about that. I have not paid any particular attention to it.

Q. How much, about, on the P. G. side? A. I don't know. I don't know what the exposure is there.

104 Q. How much on the Cotton Belt? A. I think there was more exposure on the Cotton Belt side than on the other.

Q. Don't you know, as a matter of fact, that this shed that they have got there, has an inclosure that covers the greater part of their platform?

Objected to. Sustained.

Q. Did you notice that the old compress had no inclosure whatever; that there was no inclosure there at all? A. Oh, yes. There was an inclosure over the press.

Q. You mean there was a shelter there. A. Yes sir.

Q. I ask you about the inclosure around it; do you know whether it was planked up around it or not? A. No sir, I don't remember whether it was planked up, or to what extent.

Q. Do you know the size of the shed that was there? A. No sir.

Q. Did you go down there for the purpose of examining it? A. No sir.

Q. What did you go there for? A. I could not recall it now.

Q. You did not go down there for the purpose of knowing the good or bad condition of the compress? A. No sir.

Q. Then your recollection of the compress would be very indistinct, would it not? A. It would be in some particulars, as to the exact dimensions and size. It was comparatively a new compress there.

Q. Did you notice the number of fireplugs that were there? A. No sir.

105 Re-Examination,

By Mr. Glass:

Q. Whatever contract there was about compressing the cotton, that was with the traffic department—traffic or auditing department I mean? A. Yes sir.

Q. With reference to the work that was done at that time, the labor that was performed of every kind: did you have charge of that? A. By the railroad?

Q. Yes sir. To do all the work. A. Yes sir As to the motive power department, I would not. As to the transportation department, I would.

Q. As to the expense of loading and unloading the freight, where the railroad paid for it, that would come under your jurisdiction. A. This specific station it would not. This specific station was handled by the Iron Mountain. It is a joint station. We simply pay our proportion.

Q. You spoke a moment ago about this being a concentrating point. For what purpose? A. That shippers of cotton concentrated their cotton here.

Q. Who? A. The shippers—the buyers. I presume the buyers and shippers both. The concentrated it here to re-ship it out.

Q. Who is that done by? A. For the buyer of the cotton.

Q. If you have a shipment of cotton from DeKalb, and it is concentrated in here by the shipper, or buyer, and afterwards shipped out by the same road that it was brought in by: as I understand it, the railroad protects the through rate of freight? A. That is my understanding of it. I am not much up on traffic.

Q. As an operating man however, what advantage would there be, if any, to the railroad company to charge this local rate in here, and refund it, and protect their through rate.

106 Would it be more advantageous or less advantageous than it would be for them to get a through bill of lading from DeKalb in the first instance, and ship straight to New York with the privilege of compressing en route? I am talking about it from a railroad man's standpoint—concentrating it here and then reshipping it, and refunding, or to ship it under a through bill of lading in the first instance. A. So far as this special point is concerned, there would not be very much difference to us.

Q. Why? A. Because they would have to haul the cotton here flat, and—

Q. You would have to keep the two accounts; would you have to keep the local freight account, and the through freight account if you gave a through bill of lading from DeKalb in the first instance? A. No sir, I don't think we would.

Recross-Examination

By Mr. Arnold:

Q. [Whar] benefit is it to the railroad to bring it here? A. I said there was no particular difference here, in this especial point. I said it did not make very much difference, as I see, as to whether they brought it in here to compress, or whether we hauled it here flat.

Q. Then you would have to compress it here? A. No sir, not necessarily.

Q. Where you [compresw] it, you would have to compress it on the road somewhere? A. No sir.

Q. Didn't you compress all of it? A. No sir.

Q. Is it not, then, advantageous to compress the cotton? A. In some instances.

Q. Is it customary? A. Yes sir.

107 Q. Is it not almost universally the case that you do compress all cotton shipped that far? A. No sir. Not always.

Q. Do you mean to say it is not customary to ship the cotton that way—ship from here to New York? A. No sir. I mean to say we did haul cotton there without compressing it.

Q. Is it not customary to compress it, in shipping it that far? A. I answered that question yes.

Q. Then it would have to be compressed somewheres? A. No sir. If you will let me illustrate, I will tell you where it would be an advantage. If this cotton was shipped from some of these points near Clarksville, where there was a cotton compress—shipped west of Clarksville, and stopped at Clarksville, there would be an advantage to us, because we get double the equipment. We get two cars of cotton in to one out.

Q. If there is a through bill of lading issued to New York, taking in all the carriers. Is it not advantageous to compress it at once? A. So far as Texarkana is concerned, I don't see where it makes any difference, because we have got to handle the cotton flat. If it does not go over the Iron Mountain road we do not get the hauling of it.

Q. It would be to the carrier's advantage who took it on? A. Yes sir.

Q. In this case do you understand that the T. P. has issued a through bill of lading, and agreed to carry it through. In this case, under this agreement to carry it through, would it not be advantageous to have it compressed at once, for the carrier's benefit in carrying, whether it would be your company, or some other? A. Certainly, it is more advantageous to have it compressed than to have to haul it flat.

Q. You say that the concentration here was for the 108 benefit of the shipper? A. Yes sir.

Q. In this case would it not also be for the benefit of the railroad to have gotten this cotton compressed here? A. I do not see that it would.

The Court: How could you control this traffic on other roads in shipping compressed cotton?

The Witness: Simply by it's being an interstate shipment. We are not hauling that cotton. We are concentrating it and hauling it through flat, but if it came on a through bill of lading

The Court: The testimony in this case tends to show that it was the understanding of these parties who shipped cotton from any of these points in Texas that you have mentioned, shipped it with the understanding that it was to go on your road. Do you suppose you could get a single shipment unless it was understood that it was to be compressed here?

The Witness: If you understand, what is called concentrated cotton, does not come in under a through bill of lading.

The Court: But you refund this local rate, so as to make the rate from the initial point to Utica, the same that it is from here to Utica. Do you suppose that the other lines could control this cotton unless it was compressed here?

The Witness: It comes from points where there is competition.

The Court: Then, will you tell me why they compress it?

The Witness: I am not a traffic man. I am simply a transportation man. I am not up on traffic.

The Court: The point is why your railroad would go to the expense of compressing cotton, when it was no advantage to them to compress it. Do you undertake to say for your railroad, that it has no particular purpose here in compressing cotton, when it is of no benefit to them?

The Witness: I have not said it was not a benefit to our company. I think, so far as Texarkana was concerned, from a transportation standpoint, there was no difference to the Texas & Pacific as to whether they hauled it or not.

The Court: Why do you pay ten cents per hundred to have it done?

The Witness: That cotton comes in here locally, and I presume, in order to get it out—

The Court: Then it is an advantage to you, is it not? Do you undertake to say that your company would undertake to pay ten cents a hundred pounds for compressing cotton, when it was of no use to do so?

The Witness: A company going to bill cotton from New Boston and DeKalb to Utica, if the compress—

The Court: That don't answer my question. You say it was of no advantage to your company in any direction.

The Witness. I don't say so.

The Court: That is the inference you leave upon the jury and upon the court. That does not address itself to the comnon sense of the court.

The Witness: I said from the transportation standpoint. So far as the transportation is concerned. I understood Mr. Glass asked me as a transportation man.

The Court: But as a money compensation to the railroad from the traffic business.

The Witness: That is a question I am not very [welo] posted on. I am not very well posted on traffic matters.

The Court: You are posted on railroading sufficiently to know that they do not work for nothing?

110 The Witness: No sir, they don't.

Mr. Glass: The question I wanted to know myself of the witness—the point he was making was that the T. P. railway Company did not haul the cotton any further than Texarkana. I asked the question so far as a transportation man was concerned, whether there was any advantage in giving a through bill of lading at Clarksville, with the privilege of compressing it any place, or shipping it here on a local rate and compressing it [ans] shipping it through. He answered that there was no difference.

The Court. It does not make any difference whether it was from a transportation standpoint or a financial standpoint.

Mr. Glass. He said that in this particular instance the cotton was concentrated here for the benefit of the buyer.

And further the witness saith not.

111 H. L. Redfield, called for defendant, being first duly sworn testified as follows:

Direct Examination

By Mr. Glass:

Q. Where do you live? A. Dallas.

Q. What position, if any, do you occupy with the Texas & Pacific Railway Company? A. Assistant General Freight Agent.

Q. Did you occupy that position in September, 1900? A. Yes sir.

Q. What are the duties and powers of the General Freight Agent and Assistant General Freight Agent? A. To make freight rates, and issue tariffs of the rates, rules and regulations for handling freight business.

Q. Under whose jurisdiction are the different agents of the railroad company, in so far as the traffic of the road is concerned? A. Under the General Freight Department.

Q. Under jurisdiction of the General Freight Agent? A. Yes sir.

Q. He has jurisdiction and control over the freight department? A. Yes sir.

Q. As Assistant General Freight Agent do you have the same powers over traffic business that the General Freight Agent has? A. Practically so, yes sir.

Q. What is the name of the General Freight Agent? A. E. L. Sargeant.

Q. He is living at Dallas? A. Yes sir.

112 Q. In September, 1900 Mr. C. P. Hovey was your agent at Texarkana? A. Yes sir.

Q. He was the joint agent of the Iron Mountain and T. & P.? A. Yes sir.

Q. Are those companies entirely separate and distinct? A. Yes sir.

Q. What is the object of having a joint agent at Texarkana? A. Simply a matter of convenience and to save expenses.

Q. You have seen the bill of lading that has been offered here to-day for these 50 bales of cotton? A. I have seen a copy of it?

Q. The freight rate named in that from Texarkana to Utica, New York is 85 cents on that form? A. That is the rate I saw in the copy I saw.

Q. Was that the rate for that character of shipments,—was that the published rate? A. The 85 cents was a special rate or what we call the "commodity rate", on cotton, from Texarkana, to Utica, New York, on that day.

Q. The special commodity rate? A. Yes sir.

Q. Did you have any other rate on that day from Texarkana to Utica? A. Yes sir.

Q. Was that published and sent out? A. Yes sir, that was filed in accordance with law.

Q. You mean filed with the Interstate Commerce Commission? A. Yes sir, and at the different stations that were interested in the rate?

113 Q. Was that rate sheet furnished to Texarkana also, —I mean a copy of it? A. Yes sir.

Q. Did you furnish it to all stations? A. To all of the stations interested. I think that tariff applied only from Texarkana.

Q. Will you kindly turn to it? A. (Reading) Texas & Pacific Railway Company, I. C. C.; Number 655. That was the number that was carried for the benefit of the Interstate Commerce Commission. Our individual number was J. P.; Number 3854 H. That was issued December 11th, 1899, effective December 15, 1899.

Q. Had that been superseded or was it in effect on September 17th, 1900? A. That tariff as amended by certain stipulations and additions, you might call them, or corrections, was in effect on that date.

Q. What was the rate according to that. You have already said that the rate according to this special commodity tariff was 85 cents on cotton; what was the regular tariff, not the special or commodity rate, but the class tariff? A. The rate on that day by the all rail rates was $1.37 per hundred pounds.

Q. What was the difference between that rate and the 85 cent rate? A. 52 cents.

Q. That was 52 cents per hundred pounds higher than this special commodity rate? A. That is right.

The Court: That is a thing I don't understand. I would like to have him explain what he means by those two rates.

The Witness: The 85 cent rate was a special rate ap-
114 plying on cotton from Texarkana to Utica, New York, and points taking the same rates,—cotton that was shipped under the bills of lading.

The Court: That was all rail too?

The Witness: Yes sir, a special rate that was made on contract.

The Court: How could you have two special rates?

The Witness: Those were rates we have for everybody that complied with the contract. What I mean is that is a special rate on cotton that was to be shipped under our bills of lading.

The Court: Is this other class rate a rate on cotton also?

The Witness: Yes sir, we have a classification that specifies that cotton takes first class. That does not say anything about a contract between the shipper and the railway company in which the railway makes any exceptions as to liability. That is the first class rate on cotton,—the western classification in use on all lines. We have the class rate, and the commodity or special rates. The class rate is a rate on everything except a commodity where there is a special commodity,—merchandise, general business.

The Court: Cotton is as much a commodity when it is on a special rate as when it is on a class rate?

The Witness: That is a kind of a trade expression. We have special rates or commodity rates, and make special rates on different commodities.

The Court: You made a special rate for cotton?

The Witness: Yes sir.

The Court: What is the difference between a special rate for cotton, and the class rate?

115 The Witness: The special rate for cotton has got certain requirements as to bills of lading &c., and the class rate has no requirements of that kind.

The Court: It goes under the general law without any contract of yours?

The Witness: Yes sir, common carriers.

The Court: Without any special contract of any kind between you and the shipper?

The Witness: Yes sir.

Q. The special contract you speak of is the contract where there are certain stipulations in the receipt? A. Yes sir.

Q. The class rate is where you take the merchant's contract and give him a receipt for it and ship it through without any conditions at all? A. That is a fact.

Q. As a matter of fact do you do any business or practically any business under the class rate? A. Well, so far as I know, a shipper always wants to take advantage of the contract rate, and get the lower figure that was available thereby.

Q. And was willing to take that kind of a contract? A. Take a bill of lading and contract to get the reduced rate.

Q. In September, 1900, the time you were speaking about, suppose a person had tendered to the railroad company 50 bales of cotton and refused a contract of this kind, and the agent couldn't have given him a bill of lading, and the agent had applied to your department for instructions, how would you have taken the cotton.—what would you have charged him for shipping?

116 Mr. Arnold: I don't think it is competent for him to say what he might have done under circumstances of that kind. The agents both testified that they had no authority and couldn't have signed any other form of bill of lading. They were not authorized to give another form, and it was not incumbent on the shipper to know what was going on in the office at Dallas. They gave to the agent of the company no authority to issue any other bill of lading. I don't see how it could be material.

The Court: Who settles this question of rates. Your office at Dallas?

The Witness: Yes sir.

The Court: Settles everything that pertains to rates?

The Witness: Except local Texas rates that are fixed by the Commission.

The Court: I thought you had an association that fixed those things?

The Witness: No sir. Our office at Dallas fixes but interstate rates to which the Texas & Pacific Railway Company is a party.

(Question read)

The Court: The question you have here now is whether you can now let this witness say what the office at Dallas would have done in a case of that kind. The question is, how can this man state what the office would have done about a proposition that never was submitted to the office. You can prove that they had this other rate. I don't think you can prove what the office at Texarkana would have done.

Mr. Glass: I want to prove by the man who was in charge that they had another rate and were prepared to carry it out.

The Court: If that is what you want to prove you can
117 prove that because that is not speculative.

Q. If the cotton had been tendered to the Texas & Pacific Railway Company at Texarkana to be carried to Utica, New York, and the party was not willing to accept this special contract would the railroad company have shipped it, and if so, at what rate? A. They are common carriers, and they cannot do anything but accept it, and could not do anything but accept the $1.37 rate. That was the rate that was filed with the Interstate Commerce Commission.

Q. You would have accepted it and carried it at your risk at the $1.37 rate? A. I don't know whether we would have made a notation about it being at carrier's risk. The risk was ours.

Q. Would you have accepted the cotton at the $1.37 rate and sent it there without any of these several exemptions of liability? A. Yes sir.

Cross-Examination

By Mr. Arnold:

Q. You don't know whether you would have made a notation that it was at carrier's risk or not? A. Notation on what?

Q. You said you didn't know whether you would have made any notation as to whether it was at the carrier's risk; what do you mean by that? [Q.] I mean that if there was any blank form submitted by us to be signed by the shipper in that agreement to the effect that we accepted it at carrier's risk.

Q. Did you have any blank at all to apply to a case of that kind? where you make out what you call a class rate? A. As I said before, I never heard of a case of that kind.

118 Q. In fact they knew nothing about it? A. They had a perfect right to know about it; it was public property.

Q. Don't you know that no shipper has ever heard of that? A. No sir, I don't know it.

Q. Do you know of any shipper who has heard about it? A. I don't know.

Q. Have you prepared any form of bill of lading that could be used under those circumstances? A. Not that I know of.

Q. You have no other form except this (indicating) bill of lading in suit? A. We have three different forms.

Q. You have no other form for the shipment of cotton? A. No sir; not for the shipment of cotton.

Q. You have never authorized the agent to issue any other form or to eliminate anything from that form? A. I don't know that that question ever came up?

Q. Had he been authorized to change it? A. The agent would not have been given instructions to alter the bill of lading from the commodity rate for the shipment of cotton.

Q. You have something to do with the shipping department as to all classes of goods? A. I have to do with the General Freight Department.

Q. You have forms of bills of lading that you issue to shippers in all cases, have you not? A. Every shipment that is forwarded is not forwarded on a bill of lading, your question is. Is that what you mean?

Q. Yes sir. A. Oh, no.

119 Q. Don't you give the shipper some kind of a showing? A. Many and many a shipment is forwarded without any bill of lading,—simply with instructions to forward the freight.

Q. Do you mean to say that if I am shipping a lot of goods, and they would be shipped by your road that I am not entitled to it? A. I don't say you would not be entitled to it.

Q. Is there any form of bill of lading prepared for agents to issue under this class rate that you refer to, for the shipment of cotton? A. They have a special cotton bill of lading, and this is it here (indicating).

Q. You have no other kind? A. No, other than the other forms.

Q. Those three go together? A. Yes sir.

Q. I wish you would turn to your book where you read from and show where cotton is to be charged for at the rate of $1.37 per hundred. A. Page 2 makes the first class all rail route from Shreveport $1.27; page 3 makes the first class differential 10 cents. That is an arbitrary or additional charge to go over the Shreveport rate.

Q. What is this paper (indicating)? A. The classification. Page 27 of the general classification says "cotton in bales first class."

Q. Show me that place.

Mr. Arnold: (reading) "Cotton bales or sacks"
The Witness: First class.

Q. You say that is your office book? A. Yes sir.

Q. How would the shipper ever know anything about this; did you furnish this to the public? A. Filed for pub-
120 lic inspection.

Q. Who filed it? A. We did.

Q. Where? A. In the stations and with the Interstate Commerce Commission.

Q. How many of these did you file in the station here? A. The agent is to have one, the agent's office two for the inspection of the public.

Q. Do you know that they were filed here? A. I presume they were filed here. That is the rule.

Q. Do you know that any of them were filed here at this place? A. I don't know that they were. I simply tell you the rule. That all tariffs are filed for public inspection,—all of them for public inspection, and one with the agent.

Q. You know that this (indicating) was issued generally to the public? A. Yes sir.

Q. That shows the 85 cent to Utica? A. Now, where does it. Show me.

Q. Mr. Redfield, have you examined this book? A. I didn't examine it very closely. Did you find where it shows the rate?

Q. I will ask you if you can find it, how much the book shows you will have to pay for cotton from here to Utica, New York? A. I don't know anything about it from Texarkana to Utica, New York.

Q. Do you find anything from East St. Louis to Utica, 25 cents? A. Yes sir.

Q. Cannot you look there and find how much it is from here to East St. Louis,—60 cents? A. I don't believe I can.
121 You show me. That evidently is not the tariff that makes the rate from Texarkana to Utica.

Q. What was Mr. Buron figuring on when he was making that rate? A. I don't know what he was figuring on.

Q. I want to know how you would figure,—how much on that bill of lading. A. I would figure it out of our tariff.

Q. $1.37. A. On shipments under a bill of lading?

Q. Yes sir. [Q.] No sir, we had a tariff making an 85 cent rate from Texarkana.

Q. This is correct, then? A. Yes sir. The cotton was shipped under contract but that tariff there don't show it. Texarkana isn't mentioned there anywhere.

Q. You have a public rate, then? A. Yes sir. Where did you get that (referring to paper)?

Q. From your depot agent. A. I don't know where you got it. That is a rate from East St. Louis as I read it.

Q. Going back to this paper (indicating) You say you furnished one for the inspection of the public? A. Yes sir, they are there. Interstate tariffs.

Q. Is this filed every year? A. No sir, it is not filed every year. It is re-issued, you can see there and they keep issuing supplements.

Q. This book here applies to every class of goods that you named (referring to classification)? A. I would not like to say that it does. I think it pretty near does cover them all. It is large enough. My name is signed to the tariff.

122 Q. Is it signed to this paper here (indicating). A. No sir.

Q. Who represented the T. P. in this publication? A. E. L. Sargeant, General Freight Agent.

Q. Are you over or under him? A. I am under him.

Q. If I understand that correctly (referring to paper) it was a combination of the agents of the different roads for the purpose of adjusting a tariff on shipments of cotton from this part of the country to the east? A. You never understood that from anything I have said.

Q. What is that for? A. That seems to have been issued somewhere by someone in regard to rates from East St. Louis. You never showed me anything as to Texarkana.

Q. It says freight rates here from East St. Louis. A. Yes sir.

Q. The rates fixed by you people,—the railway companies? A. The Texas & Pacific Railway Company cannot fix the rate from East St. Louis to Utica. We have no jurisdiction.

Q. You knew that the rate from East St. Louis to Utica is only 25 cents? A. Yes sir.

Q. This book has that? A. Yes sir.

Q. You knew that the rate from here to East St. Louis is 60 cents? A. Yes sir.

Q. That makes 85? A. Yes sir.

Q. This book was issued to the public for information
123 of that kind by which they might find out how much it would cost them to ship their cotton? A. In some cases it might show what the rate would be, although Texarkana is not mentioned in there. As I said before we have a through rate to Utica, New York.

Q. As you have no railroad running to Utica; can you issue a bill of lading to that point,—by what authority is that bill of lading issued? [Q.] In the first place, as I understand it, under the terms of the bill of lading, we agree to deliver cotton to the next connecting carrier, that is all. We guarantee a through rate, however.

Q. Have you any arrangements with other carriers that they will take this cotton? A. The carriers earn a certain proportion of the revenue, or "division", as we might call it.

Q. Have you got a different arrangement whereby it is agreed that this bill of lading will be honored all the way through? A. No sir. I don't know if any connecting lines should choose to charge the entire revenue on that bill of lading, the question of protection would revert back to the Texas & Pacific Railroad.

Q. You mean to say that you have no understanding with the other companies about the division of freight? A. I didn't say that?

Q. Have you had any understanding of that kind? A. I think certain proportions were allowed connecting lines for the transportation of cotton from the T. & P.

Q. They agreed to accept that? A. They did accept it.

124 Q. You have that arrangement by which you agree upon a division of the freights? A. The revenue.

Q. I will ask you if it is not a fact that although the T. & P. Railway Company may have received cotton at Texarkana, instead of putting it in its own cars it put it in Iron Mountain cars, and shipped it to New York, and that they will get the greater part of the freight because the T. & P. is the initial carrier? A. No sir,—you mean our revenue would be greater than the Iron Mountain when we originate the freight?

Q. Yes sir? A. Yes sir, that is correct.

Q. You will get the greater part of the freight from here to St. Louis? A. We would get our stipulated division.

[—] Which is the greater part of the freight,—well what proportion of the freight between here and St. Louis would you get,—would you get half or more than half,—you issue the bill of lading from Texarkana and ship it on the Iron Mountain to St. Louis,—what proportion of that freight would you get? A. I could not answer just exactly what revenue we got.

Q. About how much? A. We got in the neighborhood,—you mean on cotton originating in Texarkana?

Q. Look at this shipment here. You understand how this shipment is? A. I could not say, at the date of this shipment.

Q. What was the average at that time? A. I think it was about $1.50 a bale.

Q. That would be that much net to your company?

125 A. Yes that would be our division.

Q. After paying the expenses,—after paying for the compressing, there would be no other expense would there, except your insurance? A. It depends altogether upon where the cotton came from. If it was brought in here there would be some other expenses. If we brought it in here, however, there would have been that service that we performed.

Q. Going back to the other point (I don't want to detain you) You have no other form of bill of lading for this class of shipments of cotton that you refer to? A. We have no form for the reason it has never been asked.

The Court: You have no form: that is enough.
The Witness: No sir.

Q. As to the cotton that is mentioned in these papers there that goes there, car loads or in any other amount,—any amount,—you make no difference between a hundred and ten thousand bales? A. We don't make any difference generally, even on a commodity rate.

Re-Examination

By Mr. Glass:

Q. You say that book that Mr. Arnold showed you is a compilation of the different rates from East St. Louis to New York? A. And other points.

Q. That is gotten up and filed by the representative of the Texas & Pacific Railway Company for the convenience and information of the public? A. Yes sir.

Q. The Texas & Pacific Railway Company has nothing to do with making the rate of 25 cents? A. No sir.

126 Q. It fixes the rate and files it and puts it up in that form for the information of the public? A. Yes sir.

Q. The rates made from Texarkana,—the T. & P. makes those rates? A. Yes sir.

Q. You say all the information that you get there is that the other roads are charging the same, as a basis for making a through rate,—you make the through rate at what you make the other rates? A. Yes sir.

Q. Say this shipment goes to St. Louis over the Iron Mountain and originates in Texas at DeKalb, and is concentrated here and the shipper afterwards ships it up to St. Louis and east over the Vandalia and the Pennsylvania lines to New York, and suppose you were to make this 85 cent rate the rate from East St. Louis to New York over the Vandalia, and it had been filed with the Interstate Commerce Commission, and they had made their rate 85 cents, and you had made a mistake, you would pay the whole 85 cents you would get out of the shipment to the Vandalia? A. Yes sir.

Q. And pay the Iron Mountain its proportion? A. Yes sir.

Q. With the information you had before you as to what those other railroads are going to charge, you get the through rate, and you figure as to what the other railroads are going to charge, and to pay you for your services about? A. Yes sir.

Q. Why is it you make a different class rate without any elimination and make a lower rate when you put in an excep-

tion to their liability against fire &c. A. The additional risk we assume gives the difference in the rate. We have a hundred rules in the classification where the shipment is released
127 and the shipper gets the lower rate because the company's liability is eliminated by the stipulation for the lower rate.

Q. You have found out, have you not, that a release is not worth anything? A. Yes sir, we have found that out.

And further witness saith not.

Mr. Glass: We will consider this bill of lading in without reading it.

128 Harry Gaither, a witness called for the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Arnold:

Q. Where were you at work when the Union Compress was burned up, about September, 1900? A. I was working for the compress.

Q. On the day this compress was destroyed how many men were there at the compress and who were they? A. As well as I can recollect there were four of them.

Q. Who were they? A. There were Jim Murphy, myself, Chess Baker and Wagner.

Q. Where were you all at the time the fire broke out? A. We were upstairs eating dinner on the platform.

Q. When you refer to upstairs you mean you were not down in the boiler room? A. Yes sir, upon the floor of the platform.

Q. While you were sitting there did you notice any trains passing around there? A. I remember one train passed there. A freight train.

Q. Was that on the Cotton Belt side? A. Yes sir, going south.

Q. Was it puffing pretty heavily? A. I never noticed that. I noticed it pass just before we started to eat or about that time.

Q. How much time did you have at noon to rest? A. An hour.

Q. The gong rang to call you to dinner? A. Yes sir.

129 Q. Had you finished dinner at the time the fire broke out? A. No sir, we left our dinner, and everything burned up.

Q. How long after the train passed was it before the fire broke out? A. I don't know, just exactly, how long it was. Really I could not say.

The Court: Oh, well, you know more about it than we do. Of course you didn't have a watch to show the minutes and seconds. About how long?

The Witness: It may have been twenty minutes or half an hour. I think it was something of that kind.

Q. Did you notice a switch engine come by on the P. G. side? A. I don't remember any switch engine at all.

Q. You were not specially noticing about those trains? A. No sir.

Q. All the boys remained there for dinner and didn't get up and go about until the fire broke out? A. No sir.

Q. You put the nozzle on the hose,—did you go to the hose and turn the water on? A. Me and Chess Baker went and turned on one.

Q. That was the one close to the fire, was it? A. I believe it was. There was two. I don't remember which it was.

Q. The other one was about 140 feet down this way? A. On the P. G. side.

Q. The one that was closest to the fire was the one you turned on,—I am not talking about the nozzle, now? A. Yes sir, the one we turned on was towards the fire.

Q. About the nozzle,—was it there? A. No sir,
130 there was one nozzle we couldn't find. Baker, he tried to find it I think, and he did find it, and I went down to where I could work on the other hose. By that time the fire was under way, and we all got safe. I did.

Q. Who was the man who went with you and turned on this hose? A. If I mistake not, it was Chess Baker.

Q. After you got it in shape, and the water turned on, you discovered the nozzle was missing? A. Yes sir. Where he found it, I don't know.

(No cross-examination)

And further witness saith not.

Jim Murphy, a witness called for the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Arnold:

Q. Were you at work for the compress company when it was burned up? A. Yes sir.

Q. Where did you see that fire the first time? A. In the southwest corner of the building.

Q. How far from the press? A. I just don't know exactly. Just I think, at the corner of the building there,—it may be 75 or 50 yards.

Q. Some distance? A. Yes sir.

Q. It was very close to the railroad? A. Yes sir.

131 Q. It was near one of the two railroad cars? A. Yes sir, it was the corner of the P. G. and Cotton Belt.

Q. I will ask you if all the hands were there at the press, and who they were? A. Chess Baker, me and Harry Gaither, and Mose Wagner was up there under the shed.

Q. And Edwards was down in the boiler room? A. Yes sir.

Q. Mr. Stati was in the office? A. I suppose so.

Q. You were the first man that saw the fire? A. Yes sir.

Q. What did you do when you saw it? A. We broke to it.

Q. Did you go to that hose where the nozzle was missing? A. We all was there, but me and Chess Baker first grabbed the hose, and Harry taken the hose, and I came back to turn the water on to the hose.

Q. Did you turn it on? A. Yes sir.

Q. What did you do there; throw water on the fire? A. We had the hose stretched but the nozzle was not there.

Q. Where was it? A. I don't know.

Q. Was it lost or missing? A. It may have been; it was not there.

Q. Did you notice those trains passing twenty or thirty minutes before the fire? A. Yes sir, there was one train and a switch engine passed up to dinner.

132 Q. Which track was the switch engine on? A. On the Cotton Belt?

Q. Was there any on the P. G.? A. I didn't notice any on the P. G.

Q. After the trains went by you boys remained about the place eating your dinners? A. Yes sir.

Q. Where were your dinners kept? A. Hanging up around the place.

Cross-Examination

By Mr. Glass:

[—] The wind was blowing high, coming from the south? A. The wind was not blowing so very high, but there was a little wind.

Q. This fire started from the southwest corner of the place? A. Yes sir.

And further witness saith not.

Court adjourned.

133 Thursday, November 12th, 1903
8:30 A. M.

Mr. Glass: I will have to be sworn myself to identify some papers (after being sworn): I offer in evidence the rules and regulations of the State Railroad Commission of Texas that were adopted in pursuance of authority conferred on them by statute in regard to the handling, concentrating and compressing of cotton.

I will state to the court that as I understand it the United States Statute requires Federal courts to take judicial knowledge of all the statute laws of the different states. The law creating a railroad commission was enacted in 1891, and the commission was appointed and organized that year, and we have had a commission ever since that has fixed the rate for every character of freight, and between every point in Texas, and on every railroad. Soon after the organization of the commission these rules, under the authority conferred by the act, were adopted and promulgated by the railroad commission, and I have been reading from the original rules adopted by them. After that time, but prior to this shipment in question, I don't remember the date except I know it was prior to June 30, 1900, the railroad commission adopted some amendments or exceptions to the rules, which I will now read:

The following rules, regulating the concentration of cotton at certain points in Texas, the same being the rules adopted and promulgated and enforced by the Railroad Commission of the State of Texas, were read in evidence as follows:

Third:—Railroad Companies shall assume the cost of Compressing cotton, which is to be delivered at destination, compressed only on the following conditions:

(1) Cotton shall be compressed at shipping points when an accessible compress is in operation at said point.

(2) When no Compress is in operation at shipping point, cotton shall be compressed at a station directly intermediate between shipping point and destination, 75 miles or more from destination.

(3) The amount of the costs assumed by the railroad companies shall not exceed 10c per hundred pounds.

(4) For the purposes of concentration compress cotton may be shipped at full tariff rates to compress stations when 100 miles or more of railroad mileage from the Gulf coast, under the following conditions, and adjustments of freight charges for and after such concentration.

Fourth:—When the concentrated cotton is again delivered to the railroad companies for shipment to final destination such railroad company shall refund only its charges for service of

concentrating at Compress points on its own line, cotton which originated on its own line, except in cases where connecting lines shall be authorized to operate jointly for the concentration of cotton.

Fifth:—The entire charge for concentrating shall be refunded when the point of concentration is located as provided in the foregoing rules, and the rate from shipping point to final destination is the same as, or less than that applied from concentration points to destination, when the rate from shipping point to final destination in Texas, is greater [that] that applying from concentration points to final destination, then so much of the charge for service of concentration shall be retained by the railroad companies as will, when added to the rate from concentration point to final destination, make it maintain thaamount of the current rate from shipping point to such destination.

Thirteenth:—When cotton is tendered to railroad companies upon Compress platform, which is situated on the track of such railroad companies, it shall be the duty of the railroad companies to take charge of and receipt for such cotton in the same manner and on the same terms as they would receive and receipt for cotton when taken at its own depot or platform erected for such transactions; provided however, that the shipper or the compress company shall in such cases assume the additional risk or insurance involved by such act of the railroad company.

Defendant also read Rule 11 contained in its freight tariff ICC No. 620, effective Aug. 28th 1899, and in force until sometime during the year 1901, and in force at the time plaintiffs' cotton was placed on the compress platform, and at the time it was destroyed. Said Rule being for [thr] government on Inter-State shipments of cotton.

Rule Eleven

When cotton is tendered this company upon a compress platform which is situated on the track of this company, agent should take charge of and receipt for such cotton in the same manner and on the same terms as he would receive and receipt for the cotton if tendered him at this company's depot platform or other places assigned by it for such transactions, provided however that the shipper or the compress company shall, in such cases, assume the additional risk of insurance involved by such act of this company.

Mr. Arnold: I want to object to the testimony and to the introduction of those rules. I don't know just what figure they cut. I don't know what they were introduced for. I don't see

that the merits of the case could be affected by the rules of the railroad commission of the State of Texas. Of course, your Honor will pass upon that when you come to your instructions. I want our exception to go in.

The Court: You can save your point.

Whereupon defendant rests.

134 V. E. Buron, recalled for the plaintiff in rebuttal.

By Mr. Arnold:

Q. You were unable in your testimony yesterday to give the form of receipt which the agent of the Texas & Pacific Railway Company would give to the Union Compress Company. I hand you a form, and will ask you whether this is the form that was signed by the agents in September, 1900. Look at this paper. A. Yes sir, that is the form of the paper.

Q. The form you have there is not for this particular shipment of cotton? A. No sir. This form I made out myself, when I was working for the Texas & Pacific Railway Company. This is in my handwriting.

Q. Is that the form that was used by the Texas & Pacific Railway Company and the Union Compress Company at the time these 50 bales of cotton were put in? A. Yes sir, it is.

Q. Will you read that? A. (Reading) "I have this day issued on your compress receipts bill of lading to W. A. Arthur & Company for 150 bales of cotton"

"Marks B

Pank B. L. T. P. No. 65

No. of Bales 150. Weight 74894

Domestic. Compress and ship the above cotton by the Iron Mountain for account of L. W. McBride, Agent".

They understood Mr. McBride was the agent of the company.

Q. I will now hand you another one here.

The Court: What do you mean by "domestic".

The Witness: This domestic cotton goes within the United States. If it was to go to Europe it would be foreign. This is simply for the information of the agent.

135 The form read by the witness was identified as Number One, by the reporter.

Q. I now hand you another form; state whether that form is the same that was used, and is the same as the one you have just read? A. Yes sir.

(This form was identified by the reporter as No. 2, without being read by the witness.)

Cross-Examination

By Mr. Glass:

Q. This cotton that was placed on the Union Compress platform was handled by the compress people? A. Altogether, yes sir.

Q. And the railroad company didn't handle it from the platform or in the compress? A. No sir.

Q. The compress people placed it and loaded it on the cars, and put it in? A. Yes sir, that is the only direction we gave the compress.

Q. Were the directions contained in that form, or a similar form? A. That is the only direction.

Q. They showed that they had issued a bill of lading for a certain amount of cotton? A. Yes sir.

Q. You instructed them to compress it and load it out on certain cars? A. Yes sir.

Q. And when you read it through it said load it out on the Iron Mountain. Whatever car it goes out in it was because of that instruction there? A. Yes sir.

136 Q. You testified that all that work was done by the compress people in their own manner and without any control or directions of the railroad company? A. Yes sir.

Q. This 85 cent rate never was paid? A. No sir, that was "charges to follow".

Q. And that never was actually paid? A. No sir.

The Court: If I understand you correctly, you stated on yesterday that the railroad company had no other place to receive cotton, at that time, except at that place?

The Witness: It was customary. We could have placed it on their local platform, but they couldn't very well handle it there for that was the merchandise platform.

The Court: And it was not the usual delivery for cotton?

The Witness: No sir.

Mr. Glass: If they had brought cotton down there, and tendered it to you there, what would you have done?

The Witness: I don't know what they would have done scarcely. I would have to receive it. We would send it to the compress.

Mr. Glass: That was the customary thing?

The Witness: Yes sir.

Mr. Arnold: It was more convenient for the people to send to the compress at once?

The Witness: Yes sir.

Mr. Glass: The railroad didn't provide any facilities for handling it themselves?

The Witness: No sir, we quite often received two or three bales at the local platform that wanted to go flat; but any large lots we always sent to the compress.

137 Mr. Glass: These flat shipments were to some point around here?

The Witness: Yes sir.

Mr. Arnold: There would not be any eastern shipments there?

The Witness: No sir.

And further witness saith not.

George West, a witness recalled for the plaintiff in rebuttal, testified as follows:

Direct Examination

By Mr. Arnold:

Q. You have heard the testimony of Mr. Buron in regard to the forms of receipts that were given by the agents of the Texas & Pacific Railway Company when cotton was ordered to be sent from the compress company to some other place: state whether the form identified as Number One is the form that was used at the time these 50 bales were received? A. Yes sir, that is the form, with the exception of the heading.

Q. What is the heading? A. Texarkana Compress Company, and the one that was used at the time of the fire was Union Compress Company.

Q. Were these words used: "compress and ship the above cotton via,....for account of,...." were those words on the other form? A. Yes sir.

Q. Mr. West, did the agent of the Texas & Pacific Railway Company direct the Union Compress Company by the form such as has been identified here, to compress and ship 50 bales of cotton? A. Their instructions were similar to those.

138 Q. I will ask you if they directed and authorized you to compress and ship the cotton? A. They did through this form or on this form.

Q. The 50 bales were described by marks? A. Yes sir.

Q. And at the bottom was the direction to compress and ship by a certain car? A. Yes sir.

Q. After you got that direction, state what physical handling of the cotton took place, if anything; what did you do to the cotton,—what did you do to the cotton,—the 50 bales? A. In that instance, as we always do, we got a shipping list. But we get those instructions from the railroad company. We get what we call a shipping list from the owners of the cotton. That would be a list sent to us. Prior to the receipt of that, and immediately upon the receipt of that shipping list we

spotted or tagged the cotton which is covered by that shipping list, to its place in front of the press, preparatory to being pressed and shipped, as per those instructions.

The Court: What did you do in this particular in-
139 stance?

The Witness: That was done, in that particular instance, with that. We were going to make a run the next day, and the cotton was ready to be compressed at that time.

Q. This direction was given to you on the 17th day of September, 1900? A. About that time. I don't remember the exact date of the fire—that is, I mean as to the exact date of the fire, but I think that is the time.

Q. And under this direction here, and in the course of dealing with the railroad, you took hold of this cotton, and carried it around to the press for the purpose of having it run through? A. I said in some cases I did that before I got the directions. I don't know whether it occurred in this particular case.

Q. Was that done under your course of dealing with the railroad; were you compressing it for the railroad or the shipper? A. We were compressing it under the orders of the railroad. The shippers merely give us a shipping list, saying which cotton they want shipped, and the railroad people give the shipping directions.

The Court: Compressing and shipping instructions.

The Witness: Yes sir.

Q. The description of the cotton, as given by the agent of the railway, would correspond with the same description as furnished by the shipper. A. The shipper gives us the ticket numbers of a certain lot of cotton which might be shipped under that mark, and the railroad people then tell us to ship under those directions 150 or 50 bales, as the case may be, and mark it as that form there reads.

Q. The railroad told you to ship it; did they tell you to compress it? A. They say compress and ship.

Q. This 50 bales of cotton was moved around to the
140 press and stacked there for the purpose of compressing? A. Yes sir. It was worked up from all points of the platform?

Cross-Examination

By Mr. Glass:

Q. You say, as to this particular 50 bales, you don't remember what you did about that. A. The 50 bales that were burned? Yes sir.

Q. The course of dealing was while the cotton remained there, for the owner to give you a shipping list of certain cotton that was going to be shipped out— A. They do that, yes sir. Sometimes, as I said, we got the list after we got those instructions, and sometimes before.

Q. Were these marks already on the cotton? A. No sir, the cotton is broken out, as per their tag number on the shipping list.

Q. That is the tag number of the owner? A. Yes sir.

Q. These 50 bales of cotton; after you got a ticket from the railroad company similar to this—the 50 bales that belonged to Arthur & Co—you were holding it for them? A. Yes sir.

Q. The course was that they would give you a shipping list? A. Yes sir.

Q. So you could identify the bales of cotton? A. Yes sir.

Q. Then you at once go to work to get these bales at some convenient place to compress, and compress them as soon as you get the orders to compress them. A. Yes sir.

Q. And after the railroad would give you these shipping directions you would compress it and ship it by whatever railroad they wanted it shipped? A. Yes sir.

141 Re-Examination,

By Mr. Arnold:

Q. Do you mean to say that you moved that cotton ready for compressing it before you received the directions? A. We suppose, after we get the shipping list—after we get that and before we get the instructions, we suppose that will be followed by instructions from the railroad.

Q. You don't compress the cotton until you get the shipping instructions from the railroad. A. As a rule, we are sometimes compelled to compress cotton to make room.

Q. In this case you had been directed to compress the cotton? A. Yes sir.

Q. But you had not compressed it yet. A. No sir.

Q. After you got this order from the railroad you got the cotton around to the press.

Mr. Glass: You are assuming that.

Q. Did you move it around to be compressed before or after you got the direction from the railroad company? A. In this case I don't remember, sir.

The Court: You cannot identify the cotton from the railroad orders.

The Witness: We call that a railroad shipment, yes sir.

The Court: But you cannot identify [tye] cotton, what cotton was to be shipped out, from that railroad order at all?

The Witness: No sir. Not without being accompanied by the shipping list from the owner of the cotton.

Mr. Glass: The compress company did all the work of handling the cotton, compressing it and loading it on the cars of the company.

The Witness: In this case it was not—

Mr. Glass: But the compress company did all that work?

The Witness: Yes sir.

142 W. A. Arthur, recalled in rebuttal.

Direct-Examination,

By Mr. Arnold:

Q. You testified yesterday in regard to the fire clause in this bill of lading: State whether you know the rate, as published by the Texas & Pacific Railway for the shipment of cotton from Texarkana to Utica, New York. A. The rate was 85 cents to Utica.

Q. Is that the only rate you know anything about? A. The only rate that has been in existence for the last several years. The rate out of Texarkana used to be a dollar to Boston points. That was reduced several years ago to 95 cents, and that put the Utica rate at 85. That was the only rate we shipped under.

Q. What efforts have you made to keep advised? A. They generally mail us a tariff, or send it to us at the beginning of the season, or whenever they change a tariff.

Q. Did they ever send you a tariff showing that the rate from here to Utica would be $1.37 per hundred? A. No sir.

Q. Did you ever hear of such a tariff? A. No sir. I don't think there ever was a bale of cotton shipped from the south since I have been in business at that rate.

Q. You have been in business about 20 years: Do you know that that was the only form issued for the shipment of cotton? A. Yes sir. That was my understanding. When they changed the form they generally sent around and took up the old form and issued a new one. My understanding is they only issue one form for one period of time—one season or two seasons; but there has been no change in the forms, sometimes for two or three years.

Q. In regard to the fire clause; has there ever been any change in that form? A. I cannot say positively. In the last ten years they have probably had two or three forms.

Q. Would they all have provisions in regard to fire?

143 A. Different railroads have different forms.

Q. I am talking about the Texas & Pacific Railway Co.? A. Yes sir.

Q. They have always had a fire clause in them? A. Yes sir.

Cross-Examination,

By Mr. Glass:

[—] You spoke about a tariff: The paper I show you is the tariff you get—not this particular one, but that is the character of tariff? A. Mr. Ware attends to all this business. Different forms are used. If this is the form that he used that is the only one that could be. He can testify to that. I don't know anything about these tariffs exactly. He can answer your questions about these tariffs; I cannot, only I know we used one tariff. I know we have never had a tariff showing a rate of anything over a dollar to Utica, or to Boston.

Q. Then you don't know whether this is the tariff. A. I could look through this tariff and see if this tariff shows a rate of $1.38. If it does I could say positively we never used one. If it shows a rate of 85 cents—

Q. (reading) Texarkana, Texas, via Gulf— A. Albany New York, 85 cents.

Q. Do you remember whether they took the same rate? A. I think Albany and Utica is under the same rate.

Q. See if it does not show it (Handing paper to witness) A. Albany 85 cents.

Q. The Albany and Utica rate is the same? A. I think it is the same.

Q. The rate via Gulf would not be all rail? A. The rate all rail is 2 cents higher than the Gulf rate, on account of insurance. That makes the Gulf rate lower on account of insurance.

Q. But that is all the stations on the Texas & Pacific
144 Railway. A. That does not determine, because whenever we ship—Texarkana has no special rate, so far as that is concerned. If we ship out of Texarkana via the Gulf it is 2 cents less.

Q. Does it show that it is 2 cents less than the Gulf? A. I cannot tell you how it shows: that is the fact.

Q. Don't it show that the rate, referring to Texarkana, Texas; that the rate all rail is the same by the Gulf? A. I cannot tell you how it shows, and they don't send bills of lading. They charge us 85 cents for cotton, and via the Gulf it is 83.

Q. You don't ship to Boston? A. I don't know how that is. That would be the Boston rate, at 95; and you asked me did we ship to any other points. The Boston rate is ten cents more than the Utica rate. That would be this season 93, and if we were to ship by the Gulf to Utica (but we have not) that would be 83; while the all rail rate is 85. It is commonly known and understood that the Gulf is 2 points under.

Q. Don't you know that there is no exception in the rate from Texarkana? A. No sir.

Q. Don't it show it? A. I don't care what it shows.

Q. You would not undertake to swear that you shipped any cotton to Utica, New York, and Albany, and points included in that rate, during the season that this cotton was destroyed, at 83 cents? A. No sir. I don't think we did. I am pretty sure we did not, but we shipped to other points at the same rate.

And further the witness saith not.

145 John C. Ware, recalled for the plaintiffs, in rebuttal, testified as follows:

Direct Examination,

By Mr. Arnold:

Q. You heard the testimony of Mr. Redfield yesterday in regard to there being another rate for the shipment of cotton to Utica. State whether you ever heard of that. A. I never heard of it. It came like a bomb. I have handled the tariffs here for our firm for the last 8 or 10 years, and I have requested every season, of all the roads in Texarkana to furnish us with their tariffs.

Q. Then what is the rate, and the only rate that you have ever known or that has ever been furnished to you by this company? A. To Utica would be 85 cents, in keeping with the tariffs furnished to us annually by all the railroads.

Cross-Examination,

By Mr. Glass:

Q. What made it come like a bomb, the fact that the $1.37 was less than $2.05, as you looked it up? A. I did not look it up. I was advised yesterday evening that the proper rate could be considered $2.05. I suppose you could make it anything you wanted to from the tariff?

Q. Didn't you testify that you had investigated? A. No sir. I told you, in the presence of Mr. Redfield—

Q. Didn't you say you could make it $1.37? A. Yes sir. I suppose you could make it a little more.

Q. Didn't you say yesterday evening that you figured a little more; you could make it a little more? A. Yes sir. And likely you could figure it up to $2.05. I was trying to guy you for introducing such a proposition.

Q. You had never heard of this $1.37 rate before? A. No sir, and I never heard of any other cotton man hearing of it.

Q. You are the expert for your firm? A. Yes sir, I suppose so.

146 Q. Are you acquainted with the joint through freight tariff? A. That is that little supplement, is it not?

Q. No sir. A. I would have to examine it. Did your company furnish me a complete joint tariff, gotten up by all the roads?

Q. This is 1901, effective August 20th, 1899, continued in force until 1901, turn over here and see what the rate is from Texarkana, Texas (referring to tariff). A. That was never furnished. They never furnished us this rate. They furnished a joint rate, with all the roads leading into here signed to it.

Q. Have you got one that they did furnish you? A. I expect so, yes sir.

Q. Let me look at it a moment, please. A. They have so many little supplements and things. This is the form of rates that is referred to.

Q. You have to have something else besides this. A. I don't need it. No sir.

Q. Please show me how you get the rate from Texarkana to Utica, from that sheet. A. It is quite easy. All the agents here know, and can furnish you at a moment's notice, the rate to East St. Louis and New Orleans—

Q. I want to know how you get that from that. Let a stranger take that, that did not know anything about the rates (I don't know anything about them); show me on that list where you get the 85 cents to Utica, New York. A. I can show you; but if you were not in the cotton business, or traffic business—the Utica rate from East St. Louis is 25 cents.

Q. That is shown on that sheet? A. Yes sir. And it is known that from here to St. Louis it is 60 cents. It is a published fact.

Q. That is not shown there? A. No sir.

147 Q. You have to resort to something else besides that tariff from East St. Louis to eastern points? A. Yes sir.

Q. Didn't you have these other tariffs in your possession? A. They never furnished us these tariffs without special request, because we knew the tariffs to the river.

Q. You did not get all the tariffs? A. I might have gotten that.

Q. If the one you had there in your hand—that is the only thing you show— A. I cannot say that is all.

Q. You do not understand my question; I say, that rate or tariff that you had there in your hand don't show anything but the rate from East St. Louis? A. I think that is all. I have not gone thoroughly through it.

Q. In order to get at the other rate, you had your own knowledge of what the rate is from here to St. Louis? A. We asked the agent.

Q. And from the inquiries you made you got this 60 cents rate, and then you added 25 cents? A. Yes sir.

Q. Didn't you have that tariff of the T. P. that shows that the rate from here to Utica is 85 cents? A. I could not say that I did.

Q. Didn't you have that, or one like it, with these rules governing the reception and forwarding of cotton; were you not familiar with those rules; you are the expert for the firm. A. No sir. I guess not. Those rules there; I don't think I ever had those.

Q. Read rule 11 there; you need not read it out. A.
148 No. I never read these rules. The railroads have so many rules I never read them. I just have the joint tariff of freight, that is all I care to know.

Q. You never undertook to find the character and know what the other rules were for receiving cotton on the compress platforms? A. No sir, only that they receive it all, and are mighty glad to get it.

Q. Do you know that the rate corresponds with the rate made by the railroad commission of Texas? A. No sir.

Q. You ship cotton out of Texas and Texas points? A. Locally, yes sir.

Q. You ship that under the rate made by the railroad commission? A. I ship it at the rates the railroads give.

Q. You never undertook to find out whether they charged you too much, or not? A. Just as I stated yesterday. If they charge me a dollar too much I know I will get it back.

Mr. Arnold: When we come to make up the record we can consider those joint, all rail rates on cotton in.

Mr. Glass: We want to object to part of that. The proof is uncontradicted that that is a compilation of rates from East St. Louis to eastern points: the Texas & Pacific Company had nothing to do with the making of it. It is simply a compilation of rates.

The Court: It is what you publish to give information to the public.

Mr. Glass: Yes sir.

The Court: Should you not be bound by it?

Mr. Glass: I think not, sir. I think we should be bound by the tariff we make.

The Court: I don't see why it will benefit one side
149 or the other. I don't see, if you put it in, why you should not be bound by it, provided it has any bearing on this particular case.

Mr. Arnold: The suggestion I make is that when we come to make up the record, we can show that it was read in evidence, and we can agree upon a statement as to what it con-

tains, and who signed it. We don't want to put all this in the record.

The tariff rate book which John Ware and W. A. Arthur testified about as having been furnished to them by the agent of the Texas & Pacific Railway Company and which was referred to in their testimony and read in evidence consisted of a pamphlet, dated August 31, 1900, issued by the South Western Freight Committee, the first sheet of which shows that it was the South Western Freight Committee Arbitraries No. 4—1 of the St. Louis Iron Mountain & Southern Ry. Co, and 9 other railroads, with the Texas and Pacific Railway Company and forty two other railway Companies, dated at St. Louis August 31, 1900, effective Sept. 6, 1900, applicable on cotton shipped from east St. Louis, Ill., to Utica New York, Compiled from Tariffs of Eastern roads and fast freight lines issued by the South Western Freight Committee solely for the information of members. Among other signatures thereto is the name of E. L. Sargent, Gen'l Freight Agent of the Texas & Pacific Ry Co, and on page 3 is shown rates on Compressed cotton, shipped from Texas and Arkansas to Utica N. Y. is 25 cents per hundred pounds from East St. Louis Ill, to Utica N. Y, on through bills of lading.

C. H. Webb, a witness called for the defendant, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Glass:

Q. What position do you hold with the Texas & Pacific Railway Co.? A. I am commercial agent of the line.

Q. At what place? A. Paris, Texas.

Q How long have you been in the service of the Texas & Pacific Railway Co.? A. About 16 years.

Q. In the traffic department all the time? A. Yes sir.

Q. Are you familiar and know the rates and tariffs of the Texas & Pacific Railway Co, Local and through? A. Well, yes sir.

Q. What is that you hold in you- hand there? A. It is a tariff applying on all cotton from all points in Texas on the Texas & Pacific from Texarkana to eastern points, via Gulf and all rail, effective August 20th, 1899.

Q. Does it show when it ended? A. It was cancelled by a tariff that went into effect sometime later.

Q. Does it show the year? A. 1901, yes sir.

150 Q. But it don't show what time in the year it went out? A. No sir.

Q. Was that the tariff that was in effect here September 17th, 1900? A. Yes sir.

Q. Turn and show what the through rate was from Texarkana, Texas to Utica, New York? A. The tariff publishes the rate via Gulf as 85 cents, with the note that the rate from Texarkana, Texas, as shown herein, via Gulf, will also apply by all rail routes.

Q. Was that the same rate? A. Yes sir.

Q. What was the tariff from other stations on the line; see if it made any difference? A. From other points in Texas it would be 2 cents less than Gulf. The difference of 2 cents was added on account of insurance via all rail.

Q. Does that tariff show it? A. Yes sir.

Q. That the rate from Texarkana via all rail and the Gulf is the same? A. Yes sir.

Q. And the rate from other points is 2 cents a hundred higher via all rail than the Gulf. A. Yes sir.

Q. I will ask you if this tariff sheet is furnished by the railroad for the inspection of the public. A. Yes sir. Filed for public inspection at all stations on the Texas & Pacific Railway, and filed with the interstate commerce commission on issuance, and before it goes into effect, yes sir.

Q. Turn to Rule 11.

Mr. Glass: We offer that in evidence, Mr. Arnold.

Mr. Arnold: I object to it.

151 The Court: He can save his objection, and go ahead and see what it is. (witness read rule 11. See stipulation for this rule.)

The Court: The shipper or the compress company assumes what?

The Witness: (Reading) Provided, however, that the shipper or the compress company shall in such cases assume the additional risk of insurance involved by such act of this company.

Cross-Examination

By Mr. Arnold:

Q. How long have you been the commercial agent of the T. P.? A. This is my sixth year.

Q. What do you do as commercial agent? A. My territory is partly on the Transcontinental points, and I [—] more or less supervision of them, so far as traffic goes. I solicit [fright], and am supposed to pass on questions in my territory as to rates.

Q. You solicit [fright], do you? A. Yes sir. That is part of my duty.

Q. Do you solicit cotton from cotton shippers? A. Yes sir.

Q. To ship it to any point in the United States? A. Anywheres.

And further the witness saith not.

The End.

152 Thereupon both plaintiffs and defendant announced that the testimony in the case was closed and the foregoing was all the testimony introduced at the trial of said cause in behalf of either party.

Whereupon the defendant moved the court to instruct the jury to return a verdict for the defendant.

The court instructed the jury that upon the undisputed facts in the cause the plaintiffs were not entitled to recover and directed the jury to return a verdict [fir] the defendant; whereupon the jury returned a verdict in favor of the defendant; to which instruction of the court in directing the jury to return a verdict for the defendant, the plaintiffs at the time excepted, and the plaintiffs were given ninety days time in which to file their bill of exceptions herein.

And now come said plaintiffs W. A. Arthur & Co. and tender this their bill of exceptions and pray that the same may be allowed, signed and ordered made a part of the records of this cause.

The foregoing bill of exceptions, was by the undersigned, duly examined, allowed and signed on the 8th day of February 1904.

JOHN H. ROGERS,
Judge of the United States
Circuit Court for the Western
District of Arkansas.

Filed February 8th, 1904. John M. Somervell, Clerk.

153 U. S. Circuit Court.

Nov. Term. Nov. 12th, 1903.

W. A. Arthur & Co. Plaintiffs
vs.
Texas & Pacific Railway Company Defendant.

This cause having been called for trial on Nov. 11 1903 and a jury composed of W. H. Marks, W. L. Davis, Amzi Lewis William J. Henry, W. H. Fincher. Geo. Johnson J. T. Logan, L. C. Trull, John M. Hughes John McClerkin H. H. Haynes and T. N. Black were duly and legally impanelled and the evidence of both parties was introduced, and the court having heard all of said evidence and the argument of counsel is of the opinion that plaintiffs under the

undisputed evidence are not entitled to recover, and therefore instructs the jury to find the issues in favor of the defendant, to which instruction the plaintiff at the time excepted. And the jury thereupon returned in to court the following verdict, to-wit: "By direction of the court We the jury find the issues for the defendant, Texas & Pacific Railway Company.

J. D. Mc CLERKIN, Foreman".

It is therefore by the court ordered and adjudged that the plaintiffs W. A. Arthur & Co. take nothing from the defendant Texas & Pacific Railway Company and that the defendant go hence without day and recover all costs. And it is ordered by the court that the plaintiffs have 90 days in which to file their bill of exceptions herein.

154 In the Circuit Court of the United States for the Western District of Arkansas. Texarkana Division.

W. A. Arthur & Co. Plaintiffs
vs.
Texas & Pacific Railway Company Defendant.

Petition for Writ of Error.

Now come W. A. Arthur and John C. Ware, partners as W. A. Arthur & Co., plaintiffs herein, and say that on the .... day of November 1903 this court entered judgment herein in favor of the defendant and against these plaintiffs, in which judgment, and the proceedings had prior thereto, errors were committed to the prejudice of these plaintiffs, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore these plaintiffs pray that a writ of error may issue in this behalf to the United States Corcuit Court of Appeals for the Eighth Circuit, for the correction of the errors so complained of; and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the United States Circuit Court of Appeals.

W. H. ARNOLD & L. A. ROWLAND,
Attorneys for Plaintiffs.

No. 222. W. A. Arthur & Co. Plaintiffs, vs. Texas & Pacific Ry. Co. Defendant. Petition for Writ of Error. Filed Feb. 12th, 1904. John M. Somervell, Clerk.

2/10, 1904.

The Writ of Error is this day granted.

JOHN H. ROGERS, Judge.

W. H. Arnold & L. A. Rowland,
Attorneys.

155 In the Circuit Court of the United States for the Western District of Arkansas. Texarkana Division.

W. A. Arthur & Co., Plaintiffs,
vs.
Texas & Pacific Railway Co., Defendant.

Assignment of Errors.

The plaintiffs W. A. Arthur and John C. Ware, partners as W. A. Arthur & Co., in connection with their petition for a writ of error, make the following assignment of errors, which they aver occurred upon the trial of this cause.

1. The Judgment of the Court is contrary to the law.

2. Said Judgment of the Court is contrary to the evidence.

3. Said Judgment of the Court is contrary to the law and the evidence.

4. The Court erred in directing the jury that upon the undisputed facts in the case to render a verdict for the defendant.

W. H. ARNOLD & L. A. ROWLAND,
Attorneys for Plaintiffs.

No. 222. W. A. Arthur & Co., Plaintiffs, vs. Texas & Pacific Railway Co., Defendant. Assignment of Errors. Filed Feb. 12th, 1904. John M. Somervell, Clerk.

156 In the Circuit Court of the United States for the Western District of Arkansas. Texarkana Division.

W. A. Arthur & Company, Plaintiffs,
vs.
Texas & Pacific Railway Co., Defendant.

Supersedeas Bond.

Know all Men by These Presents. That we W. A. Arthur and John C. Ware, as principals, and E. K. Smith and B. H. Kuhl, as sureties, are held and firmly bound unto the Texas & Pacific Railway Company, and unto its successors and assigns, in the full and just sum of Five Hundred Dollars, to be paid to the said Texas & Pacific Ry. Co., its successors and assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 10th day of February in the year of Our Lord One Thousand Nine Hundred and Four.

Whereas, lately at the November Term of the Circuit Court of the United States for the Western District of Arkansas, Texarkana Division, in a suit depending in said Court, between W. A. Arthur and John C. Ware, partners as W. A. Arthur & Co., plaintiffs and the Texas & Pacific Railway Company defendant, judgment was rendered against the said W. A. Arthur and John C. Ware, and the said W. A. Arthur and John C. Ware have obtained a writ of error in the aforesaid suit, and a citation directed to the said Texas & Pacific Railway Company citing and admonishing it to appear in the United States Circuit Court of Appeals, for the Eighth Circuit, at the City of St. Louis Missouri, sixty days from and after the date of said citation.

Now the condition of this obligation is such that if the said W. A. Arthur and John C. Ware shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make good their plea, then the above obligation to be void; else to remain in full force and virtue.

Signed and delivered in presence of

W. A. ARTHUR,
JNO. C. WARE,
E. K. SMITH,
B. H. KUHL.

Approved: JNO. H. ROGERS, Judge.

No. 222. W. A. Arthur & Co., Plaintiffs, vs. Texas & Pacific Ry. Co. Supersedeas Bond. Filed Feb. 12th 1904. John M. Somervell, Clerk.

157 United States of America to the Texas & Pacific Railway Co.—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the Clerk's Office of the United States Circuit Court for the Western District of Arkansas, Texarkana Division, thereof, wherein, W. A. Arthur and John C. Ware, partners as W. A. Arthur & Co., are plaintiffs in error, and you are Defendant in Error, to show cause if any there be, why the judgment rendered against the said W. A. Arthur and John C. Ware, partners as W. A. Arthur & Co., as in said writ of error mentioned

should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable John H. Rogers, Judge of the Circuit Court of the United States for the Western District of Arkansas, this 10 day of February, A. D. 1904.

JOHN H. ROGERS,
Judge of the Circuit Court of the United States
for the Western District of Arkansas.

We hereby accept service of this citation Feby 10, 1904.

GLASS ESTES & KING,
Attys. for Texas & Pacific Ry. Co., Deft. in Error.

No. 222. W. A. Arthur & Co., Plaintiffs, versus Texas & Pacific Ry. Co., Defendant. Citation. Filed Feb. 12, 1904. John M. Somervell, Clk.

158 United States of America—ss.

The President of the United States of America, to the Honorable Judges of the United States Circuit Court for the Western District of Arkansas, Texarkana Division—Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, at the November term, 1903, thereof, between W. A. Arthur and John C. Ware, partners as W. A. Arthur & Co., Plaintiffs, and Texas & Pacific Railway Co., Defendant, a manifest error hath happened to the great damage of the said W. A. Arthur and John C. Ware, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Eighth Circuit, together with this writ, so that you have the record and proceedings aforesaid at the City of St. Louis, and filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Eighth Circuit on or before the 10th day of April, 1904, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that

error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 10 day of February, in the year of our Lord, One Thousand Nine Hundred and Four.

The Seal of the Circuit Court U. S. A. West. Dist. Ark. Texarkana Division.

Issued at office in Texarkana, Arkansas, with the seal of the United States Circuit Court for the Western District of Arkansas, Texarkana Division, and dated as aforesaid.

JOHN M. SOMERVELL,
Clerk of the United States Circuit Court for the Western District of Arkansas, Texarkana Division.

Allowed by
JOHN H. ROGERS, Judge.

United States of America,
Texarkana Division of Arkansas.

In obedience to the command of the within [write], I herewith transmit to the United States Circuit Court of Appeals, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

The Seal of the Circuit Court U. S. A. West. Dist. Ark. Texarkana Division.

In Witness Whereof, I hereto subscribe my name and affix the seal of the United States Circuit Court for the Western District of Arkansas, Texarkana Division.

JOHN M. SOMERVELL,
Clerk of the United States Circuit Court for the Western District of Arkansas, Texarkana Division.

No. 222. W. A. Arthur & Co., Plaintiffs, versus Texas & Pacific Ry. Co., Defendant. Writ of Error. Filed Feby. 12. 1904. John M. Somervell, Clerk.

159 United States Circuit Court Texarkana Division, Western District of Arkansas.

I, John M. Somervell, Clerk of the United States Circuit Court for the Texarkana Division of the Western District of Arkansas, do hereby certify that the foregoing 158 pages contain a full

complete and correct copy of the Amended Complaint, Amended Answer, with amendment to said answer, Bill of Exceptions Judgment of the Court, Petition for Writ of Error, Assignment of Errors, Supersedeas Bond and the original Citation and Writ of Error, in the case of W. A. Arthur & Co. vs. The Texas & Pacific Railway Company as the same appears on file and of record in said court.

The Seal of the Circuit Court U. S. A. West. Dist. Ark. Texarkana Division.

In Testimony Whereof, I have hereunto set my hand as said clerk and affixed the seal of said court at my office in Texarkana Arkansas, this 26th day of February A. D. 1904.

JOHN M. SOMERVELL, Clerk.

Cost of Transcript $50.00. Paid by Plaintiffs.

JOHN M. SOMERVELL, Clerk.

Filed Mar. 1, 1904. John D. Jordan, Clerk.

(*Appearance of Counsel for Plaintiffs in Error.*)

And on the fourth day of March, A. D. 1904, the appearance of counsel for plaintiffs in error was filed in the Clerk's office of said Circuit Court of Appeals in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2044.

W. A. ARTHUR and JOHN C. WARE, Partners as W. A. Arthur and Company, Plaintiffs in Error,
*vs.*
TEXAS AND PACIFIC RAILWAY COMPANY.

The Clerk will enter my appearance as Counsel for the Plaintiffs in Error.

W. H. ARNOLD.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2044. W. A. Arthur, *et al.*, Pl'ffs in Error, *v.* Texas and Pacific Railway Co. Appearance. Filed Mar. 4, 1904, John D. Jordan, Clerk. W. H. Arnold, Counsel for Pl'ffs in Error.

(*Appearance of Counsel for Defendant in Error.*)

And on the fourth day of April, A. D. 1904, the appearance of counsel for defendant in error was filed in the Clerk's office of said Circuit Court of Appeals in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2044.

W. A. ARTHUR *et al.*, Plaintiffs in Error,
*vs.*
TEXAS AND PACIFIC RAILWAY COMPANY.

The Clerk will enter my appearance as Counsel for the Defendant in Error.

HIRAM GLASS.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2044. W. A. Arthur, *et al.*, Pl'ffs in Error, *v.* Texas and Pacific Railway Co. Appearance. Filed Apr. 4, 1904, John D. Jordan, Clerk. Hiram Glass, Counsel for Def't in Error.

(*Argument Commenced.*)

And on the eighth day of December, A. D. 1904, in the record of the proceedings of said Circuit Court of Appeals is an entry in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1904.

THURSDAY, *December* 8, 1904.

No. 2044.

W. A. ARTHUR *et al.*, Plaintiffs in Error,
*vs.*
TEXAS AND PACIFIC RAILWAY COMPANY.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

This cause having been called for hearing in its regular order, argument was commenced by Mr. W. H. Arnold in behalf of the Plaintiffs in Error, but the hour of adjournment having arrived before the conclusion thereof, the further hearing of this cause was postponed until tomorrow morning.

(*Order of Submission.*)

And on the ninth day of December, A. D. 1904, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1904.

FRIDAY, *December* 9, 1904.

No. 2044.

W. A. ARTHUR *et al.*, Plaintiffs in Error,
*vs.*
TEXAS AND PACIFIC RAILWAY COMPANY.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

This cause having been called this day for further hearing, argument was continued by Mr. W. H. Arnold for the Plaintiffs in Error and by Mr. Hiram Glass for the Defendant in Error and concluded by Mr. W. H. Arnold for the Plaintiffs in Error.

Thereupon the cause was submitted to the Court upon the transcript of record from said Circuit Court and the briefs of counsel filed herein.

(*Opinion.*)

And on the sixteenth day of May, A. D. 1905, an opinion of said Circuit Court of Appeals was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1905.

No. 2044.

W. A. ARTHUR and JOHN C. WARE, Partners as W. A. Arthur & Co., Plaintiffs in Error,
*vs.*
TEXAS & PACIFIC RAILWAY COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

Mr. W. H. Arnold for plaintiffs in error.
Mr. Hiram Glass (Mr. W. L. Estes and Mr. John J. King were with him on the brief) for defendant in error.

Before Sanborn and Van Devanter, Circuit Judges, and Philips, District Judge.

*Statement.*

This is an action instituted by plaintiffs in error against the defendant in error to recover $2,605.53, the value of fifty bales of cotton, alleged to have been delivered to the defendant company by plaintiffs at Texarkana, Texas, to be transported to Utica, New York. The defendant company, a railroad corporation in the State of Texas, had its depot station in Texarkana, on the Texas side, the State line between Texas and Arkansas running through said city.

The defendant company had no line of railway from Texarkana to Utica, New York; but had a traffic arrangement for the division of revenues between it and connecting carriers between Texas and Utica. The defendant company had authority to give a bill of lading for the shipment of cotton made over the through line, the rate of shipment from Texarkana to St. Louis being 25 cents per hundred pounds, and from there to Utica 60 cents, making in the aggregate 85 cents. The petition alleged that the defendant company held itself out as a common carrier for such transportation.

The Union Compress Company was an independent corporation, engaged in the business, at Texarkana, of compressing cotton delivered by shippers at said point for transportation. Its platforms

for such purpose were on the Arkansas side of the State line. According to the usage of such business, which prevailed at that place, as at other shipping points in Texas and Arkansas, when cotton was brought in by shippers, it was unloaded at the platforms of the Compress Company and a receipt taken therefor from said last named company by the shipper, which he would carry to the agent of the railroad company, who would take the same up and issue, based thereon, a bill of lading to the shipper. The Compress Company retained possession of the cotton until such time as it could compress the same, and when compressed it delivered the same on board the cars of the railroad company.

The bill of lading in this case contained the following stipulation: "That neither The Texas & Pacific Railway Company nor any connecting carrier handling said cotton shall be liable for damages to or destruction of said cotton by fire, nor for any loss thereof or damage thereto by causes beyond its control." It contained the further stipulation that: "Each carrier over whose route the cotton is to be carried hereunder shall have the privilege, at its own cost, of compressing same, for greater convenience in handling and forwarding, and shall not be responsible for deviation or unavoidable delays in procuring such compression."

Two days after the cotton was so left upon said platform, it was destroyed by fire, in connection with a large amount of cotton belonging to other shippers, with which it had been mingled. The fire was caused by sparks communicated to some part of the quantity of cotton on the platform from a passing engine of another railroad company.

The petition alleges that said platform of the Union Compress Company was not a safe place on which to keep cotton; that it was not enclosed, and no proper provision was made to prevent its destruction by fire; that the Compress Company had failed to provide suitable or proper apparatus for putting out fires, or to keep proper watch over the same; and that it was destroyed by reason of the negligence of those in charge thereof. The further allegation of the petition is that the defendant railroad company received the cotton from the plaintiffs and turned the same over to the Compress Company as its agent, to be compressed, and that it is responsible for the negligent act of its agent.

The answer denied that the defendant company received the cotton from the shipper; but alleges the facts as above stated, that the shippers delivered the cotton in fact to the Compress Company as an independent contractor, and that it was not at the time the agent of the defendant company for the compression and preparation of said cotton for transportation. It put in issue the allegation of the petition that it held itself out as a common carrier for said cotton from Texarkana to Utica, or that it was in partnership with the other roads which were to carry the cotton to its destination. It admitted that it had a traffic arrangement with the other roads upon a division of revenues for the carriage of said cotton over the lines to Utica, New York. The answer alleged that the entire line owned and operated by the defendant was in the State of Texas; that it

had its own depot station in Texarkana in the State of Texas; and that the cotton was delivered as aforesaid at said platform of the Compress Company for compression according to the rules and regulations that prevailed in such matters.

The evidence tended to show that the cotton while on said platform was not properly safeguarded against accident of destruction, by fire, and that the servants of the Compress Company perhaps did not keep sufficient watch over the cotton to prevent its destruction in the event of fire being communicated to it by railroad engines passing said platform.

The Railroad Commission of the State of Texas had adopted and maintained in force the following rule in reference to the receipt of cotton by railroads in Texas located on cotton compress platforms:

"When cotton is tendered to railroad companies upon compress platforms, which is situated on the track of such railroad companies, it shall be the duty of the railroad companies to take charge of and receipt for such cotton in the same manner and on the same terms as they would receive and receipt for cotton when taken at its own depot or platform erected for such transactions; provided, however, that the shipper or the compress company shall in such cases assume the additional risk of insurance involved by such act of the railroad company."

Pursuant to said regulation the defendant railroad company adopted rule 11, covering substantially the requirements of said regulation.

The plaintiffs were cotton buyers at Texarkana; and had for some time prior to the shipment in question been shipping cotton on like arrangements with the defendant company, and were familiar with the usages that obtained at said place in respect of such shipments.

At the conclusion of the evidence, the court directed the jury to return a verdict for the defendant, which was done, and judgment entered accordingly; to reverse which the plaintiffs prosecute this writ of error. Other facts will appear in the following opinion.

PHILIPS, District Judge, after stating the case as above, delivered the opinion of the Court.

The plaintiffs seek to avoid the stipulation in the bill of lading, which exempted the railroad company from liability for the loss of said cotton occasioned by fire, on the ground of what counsel terms duress in accepting said bill of lading, and for the want of proper consideration for such special exemption. He contends that the railway company had established and offered but one rate for such through shipment, based upon such exemption, without affording the shipper the alternative opportunity of paying a higher rate of carriage, to fix upon it the common law liability of such common carrier.

The validity of such provision in such shipping contract was considered by the Court of Appeals of the Fifth Circuit in Cau *v.* Texas & Pacific Railway Company, 113 Fed. 91, 51 C. C. A. 76.

That case grew out of a loss from the same fire involved in the case at bar. The validity of the fire exemption clause in the bill of lading was assailed on grounds quite similar to these here interposed. The ruling of the court is expressed in the syllabus as follows:

"A shipper is bound by a provision in a bill of lading exempting the carrier from liability for loss of the goods by fire, where he was chargeable with knowledge that the bill contained such clause, and made no objection thereto, and it is not shown that the loss resulted from the carrier's negligence."

On writ of error to the Supreme Court this ruling was affirmed (194 U. S. 427). The Supreme Court decided, in effect, every contention here made by plaintiffs in error. It held that it was perfectly competent for the carrier, by special contract, to limit its common law liability in this respect, so long as it practiced no deceit or fraud on the shipper in making it. In respect of the suggestion that there was no independent consideration for the exemption, the court said:

"This point was made in York Co. *v.* Central Railroad, 3 Wall. 107. In response it was said: 'The second position is answered by the fact that there is no evidence that a consideration was not given for the stipulation. The company, probably, had rates of charges proportioned to the risks they assumed from the nature of the goods carried, and the exception of losses by fire must necessarily have affected the compensation demanded. Be this as it may, the consideration expressed was sufficient to support the entire contract made.' In other words, the consideration expressed in the bill of lading was sufficient to support its stipulations. This effect is not averted by showing that the defendant had only one rate. It was the rate also of all other roads, and presumably it was adopted and offered to shippers in view of the limitation of the common law liability of the roads."

In respect of the contention that no option was given to the shipper to select under which, the common law or limited liability, he would ship his cotton, the court said:

"Primarily the carrier's responsibility is that expressed in the common law, and the shipper may insist upon the responsibility. But he may consent to a limitation of it, and this is the 'option and opportunity' which is offered to him. What other can be necessary? There can be no limitation of liability without the assent of the shipper (New Jersey Steam Navigation Co. *v.* Merchants' Bank, 6 How. 344), and there can be no stipulation for any exemption by a carrier which is not just and reasonable in the eye of the law. (Railroad Co. *v.* Lockwood, 17 Wall. 357; Bank of Kentucky *v.* Adams Express Co., 93 U. S. 174.)

"Inside of that limitation, the carrier may modify his responsibilty by special contract with a shipper. A bill of lading limiting liability constitutes such a contract, and knowledge of the contents by the shipper will be presumed."

There, as here, the plaintiff introduced evidence to show that the railroad company had but one schedule of rates for said carriage. About the only discernible difference in the proof there offered and

here consists in this: that here one of the plaintiffs, or their agent, testified that on some former occasion he was informed by defendant's agent that he was not authorized to give any other rate than that expressed in the bill of lading, with the fire exemption clause, and that no other kind of bill of lading had been furnished him by the railroad company. Coupled with this, however, the agent testified that he was not authorized to make such change without the permission of the Superintendent at Dallas. The testimony of the Superintendent of the company was that the company had such established common law rate, higher than that specified in the bill of lading, and that the shipper could have obtained it by the asking. The plaintiffs conceded that on the occasion of this particular shipment they did not ask for such common law rate—simply assuming that it would not be conceded. This fact does not differentiate the case from the rule of law laid down by the Supreme Court in the Cau case. Being entitled to hold the public carrier to its common law liability, to accept and carry his goods without the fire exemption clause, by paying the higher rate, if he would hold the carrier to its common law obligation he should at the time the goods are tendered demand of the carrier an unqualified acceptance, and put upon it the responsibility of a refusal. Hutchinson on Carriers, Sec. 240, says that:

"Every man of ordinary intelligence knows that no individual or company, engaged in the business of carrying to distant places, now undertakes to carry his goods subject to the old common law liability of the carrier. He knows moreover that bills of lading are given, not only in evidence of the receipt of the goods, but as expressing direct notice that they will be carried on certain terms. Knowing this, he cannot be willfully blind and plead ignorance, when it was his duty to know, and knowing in such cases is assenting. As it was his intention to hold the carrier to his common law liability he should have said so, and have either declined to employ him, or have sued him for his refusal, after tendering a reasonable sum for his services and risk."

In the view we take of the effect of the fire exemption clause, it is not necessary to determine the question discussed by respective counsel, as to whether or not the defendant railway company should be held to the acceptance of the cotton under its common law obligation as a carrier beyond the limits of its own line, as the non-liability for the loss by fire would apply in either event.

To avoid this obstacle to a recovery, the final contention of counsel for plaintiff in error is, that the railroad company in fact received from them the cotton and turned it over to the Compress Company for compression, as matter of its own convenience in shipping; and that the Compress Company at the time of the fire held the cotton as the agent of the defendant in error; and, therefore, the negligence of the Compress Company is imputable to the carrier.

The railway company did not, as alleged in the petition, first receive the cotton from the shipper and then turn it over to the Compress Company. On the contrary, according to the universal custom which prevailed throughout the southwest, the cotton when

brought in for the merchant buyers was unloaded upon the platform of the Compress Company, which receipted therefor to the shipper, who then took the receipt to the railroad company at its station and exchanged it for the bill of lading. Under the regulation made by the Railroad Commissioners of Texas, the railroad company had no discretion in the matter of issuing a bill of lading in exchange for the receipt given by the Compress Company to the shipper. It cannot be maintained, however, that because of this arbitrary regulation the Compress Company became the agent of the railroad company for the custody and care of the cotton, so as to render the latter liable for injury thereto through the negligence of the former. The doctrine of *respondeat superior* rests upon the right and duty of the principal to direct and control the conduct and action of the imputed agent. Any regulation, prescribed by an agency of the State, which would undertake to impose a pecuniary liability upon one person for the conduct or act of a third party, who is an independent actor, would contravene fundamental law.

Where the party sought to be held responsible as master for the negligence of the servant is without the authority to direct the time and manner of doing the work, or to select or direct the employés engaged therein, the doctrine of *respondeat superior* has no application. In short, to fix this obligation of accountability upon the party as master, he must have the right to direct the manner in which the business shall be done, "not only shall be done, but how it shall be done." (New Orleans R. Co. *v.* Hanning, 15 Wall. 656; Singer Mfg. Co. *v.* Rahn, 132 U. S. 523; Brady *v.* Chic. Gt. Wn. Ry. Co. 52 C. C. A. 48, 55; Bailey *v.* Troy, etc., Co. *Co.*, 57 Vt. 256; Casement *v.* Brown, 148 U. S. 615, 622). Bliss, J., in Hilsdorf *v.* City of St. Louis, *et al.*, 45 Mo. 94, 98, said:

"The rule that prescribes the responsibility of principals, whether private persons or corporations, for acts of others, is based upon their power to control. If the master cannot command the servant, the acts of the servant are clearly not his. He is not the master, for the relation implied by that term is one of power—of command; and if the principal cannot control his agent, he is not an agent, but holds some other or additional relation. In neither case can the maxim *respondeat superior* apply to them, for there is no superior to respond."

From this has resulted the established doctrine that where one renders a service to another, representing the will of his employer only in the result of his work, and not as to the means, he is a contractor and not a servant. (Clark's Adm'r *v.* H. & St. Joseph R. R. Co., 36 Mo. 218; Fink *v.* Missouri Furnace Co., 82 Mo. 276; Burns *v.* McDonald, 57 M. A. 601; 20 Am. & Eng. Enc. of Law (2d ed.) p. 11, 12.)

The Compress Company was a separate, independent contractor. It provided its own platform, its own machinery, its own employés, and determined for itself the manner and time of preparing the cotton for shipment. The right of the railroad company to thus have it prepared was recognized by the contract in the bill of lading. The actual custody and care of the cotton, until compressed and

delivered on the cars of the carrier, remained with the Compress Company. This was the usage of the business in such shipments, well understood between the parties. It was *haec est conventio*, as much as if written into the bill of lading.

The giving of such bill of lading under such circumstances does not render the carrier liable until it has actually taken possession of the cotton described. Mr. Justice Miller, in Pollard *v.* Vinton, 105 U. S. 8, discussing the nature and effect of a bill of lading, said:

"It is an instrument of a two-fold character. It is at once a receipt and a contract. In the former character, it is an acknowledgement of the receipt of the property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry and to deliver. And the doctrine is applicable to transportation contracts made in that form by railway companies and other carriers by land as well as by sea."

In Missouri Pacific Railway Company *v.* McFadden, 154 U. S. 155, the answer alleged a state of facts quite similar to these under review. While admitting that the defendant had issued the bill of lading for the cotton, the cotton had not indeed been delivered to it; that according to the custom, well known to the shippers, after the cotton was placed on the platform at the compress to be compressed, the latter would issue a bill of lading to the consignors; when the agent of the compress company would check out the cotton intended, the shipper would make out a bill of lading, which would be o. k'd by the superintendent of the compress company, and afterwards would be brought to the agent of the defendant, and by it signed, and the defendant would actually receive the cotton only after it was compressed and delivered upon its cars; that this course was pursued as a matter of convenience by the compress company and the shipper; and that it was not intended that the liability of the carrier would attach until the cotton was actually delivered upon its cars. The cotton was destroyed by fire while in the hands of the defendant. Exceptions to this answer were taken by the plaintiff, and were sustained by the Circuit Court. While the bill of lading raised a *prima facies* that the goods had been received by the carrier, yet as the fact was that the property at the time of signing the bill of lading was in the hands of the shipper through the compress company for the purpose of being compressed, according to the prevalent usage, the Supreme Court applied the elementary rule that the liability of the carrier wth respect to the goods "commenced with their delivery to him, and this delivery must be complete, so as to put upon him the exclusive duty of seeing to their safety. The law will not divide the duty or the obligation between the carrier and the owner of the goods. It must rest entireiy upon the one or the other; and until it has become imposed upon the carrier by a delivery and acceptance he cannot be held responsible for them."

The case of Edwards & Co. *v.* Texas Midland R. Co. 81 S. W. (Tex. Ap.) 800, in its essential facts is quite similar to the case at bar. The only practical difference is that after the cotton was

brought by the owner to the platform of the compress company and receipted for, and after the receipt was taken to the agent of the carrier to exchange for a bill of lading, it was delayed to await the taking out of the insurance policy contemplated by said regulation of the State Railroad Commissioners; but before it was issued the cotton was destroyed by fire. The mode of procedure was practically identical with that in the case at bar. The cost of compression was included in the rates paid by the shipper to the railroad company, which was to pay the compress company. It was held that under such custom and usage, the compress company exercised a distinct and independent employment; that the cotton had not "been stored for compression in the first instance by the railroad company;" that as the cotton at the time of the fire had not been compressed, it was not, therefore, ready for shipment. "Until the cotton was compressed and loaded onto the cars, it was in the exclusive and physical possession, and under the exclusive control of the compress company, to be stored wherever, and cared for as the compress company saw fit; and neither the owner nor the carrier had or exercised any control whatever over its care, custody, storage, or compression, while it was on the compress platform. * * * After the cotton had been placed on the platform of the compress company, the shipper exercised no control over it, and had nothing whatever to do with it, except to give shipping directions to the compress company. The superintendent of the compress company was the only one to determine when the shipping conditions should be carried out; that is, when the cotton would be compressed and loaded onto the cars."

There, as here, the particular cotton when the fire occurred had not been compressed. The court further found that "there was absolutely no evidence in the case which had any tendency to show that the railroad company had or exercised any control over the cotton or the place where it was kept by the compress company before it was put upon the cars by that company." The conclusion of the court was that "appellee is not liable, and appellants are not entitled to recover, unless appellee had possession or control of the cotton at the time it was destroyed by fire."

So in Martin *v.* Railway Co., 55 Ark. 510, a case parallel to this, it was distinctly held that the compress company was of the character of an independent contractor; and, therefore, the railroad company was not liable for the negligence of the compress company in storing or handling the cotton.

There is much force in the suggestion of counsel for defendant in error that in principle the office of the compress company should be likened to that of stevedores, engaged in the business of loading and unloading water carrying crafts, who are held to be independent contractors, for whose acts of negligence the carrier is not liable, as the stevedores are not its agents. (Dyer *v.* National Steamship Co., 4 Fed., 493; Rankin *v.* Merchants & Miners Tr. Co., 73 Ga. 229.)

Other questions are discussed by learned counsel for planitiffs in error, which have, by the courts of recognized authority, either been determined adversely to the contention of counsel, or which do not affect the conclusion of this court.

It results that the judgment of the Circuit Court must be affirmed. Filed May 16, 1905.

(*Judgment.*)

And on the sixteenth day of May, A. D. 1905, in the record of the proceedings of said Circuit Court of Appeals is a judgment in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1905.

TUESDAY, *May* 16, 1905.

No. 2044.

W. A. ARTHUR and JOHN C. WARE, Partners as W. A. Arthur and Co., Plaintiffs in Error,
*vs.*
TEXAS AND PACIFIC RAILWAY COMPANY.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Western District of Arkansas, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court, in this cause, be, and the same is hereby, affirmed with costs; and that the Texas and Pacific Railway Company have and recover against W. A. Arthur and John C. Ware, partners as W. A. Arthur and Co., the sum of twenty dollars for its costs herein and have execution therefor.

May 16, 1905.

(*Petition for Writ of Error.*)

And on the eighth day of December, A. D. 1905, a petition for writ of error was filed in the Clerk's office of said Circuit Court of Appeals in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Eighth Circuit.

WILLIAM A. ARTHUR & COMPANY, Plaintiffs in Error,
*vs.*
TEXAS & PACIFIC RAILWAY COMPANY, Defendant in Error.

*Petition for Writ of Error.*

Your petitioners, William A. Arthur & Co., plaintiffs in error in the above entitled cause, respectfully show that the above entitled

cause is now pending in the United States Circuit Court of Appeals for the Eighth Circuit, and that a judgment therein has been rendered on the sixteenth day of May, 1905, affirming a judgment of the Circuit Court of the United States for the Western District of Arkansas, and that the matter in controversy in said suit exceeds one thousand dollars, besides costs, and that the jurisdiction of none of the courts above mentioned is or was dependent in any wise upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of the different states, and that this cause does not arise under the patent laws, nor the revenue laws, nor the criminal laws and that it is not an admiralty case, and that it is a proper cause to be reviewed by the Supreme Court of the United States upon writ of error; and therefore your petitioners would respectfully pray that a writ of error be allowed them in the above entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit to send the Record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignments of errors herewith filed by said plaintiffs in error may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

WM. A. ARTHUR & CO.,
*Plaintiffs in Error,*
By JAMES K. JONES,
*Their Attorney.*

Dec. 6", 1905.

The foregoing petition is granted, and writ of error allowed as prayed for upon plaintiffs giving bond according to law in the sum of $500.00.

DAVID J. BREWER,
*Associate Justice of the Supreme Court of the U. S.*

(Endorsed:) No. 2044. W. A. Arthur & Co., Plaintiffs in Error *versus* Texas & Pacific Railway Co., Defendant in Error. Petition for Writ of Error. Filed Dec. 8, 1905, John D. Jordan Clerk. James K. Jones, for Plaintiffs in Error.

*(Assignment of Errors.)*

And on the eighth day of December, A. D. 1905, an assignment of errors was filed in the Clerk's office of said Circuit Court of Appeals in said cause, in the words and figures following, to-wit:

The United States Circuit Court of Appeals, Eighth Circuit.

WILLIAM A. ARTHUR & CO., Plaintiffs in Error,
*vs.*
TEXAS & PACIFIC RAILWAY COMPANY, Defendant in Error.

Assignment of Errors.

And now come the Plaintiffs in Error, William A. Arthur & Co., by their attorney, James K. Jones, and say that in the record and proceedings aforesaid of said United States Circuit Court of Appeals for the Eighth Circuit, in the above entitled cause, and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of said plaintiffs in error in this, to-wit:

First. Said Circuit Court of Appeals erred in entering judgment, affirming judgment of the Circuit Court of the United States for the Western District of Arkansas in favor of the defendant in error and against the plaintiffs in error.

Second. Said Circuit Court of Appeals erred in not reversing the said judgment of the United States Circuit Court aforesaid, and in not remanding said cause to said Circuit Court for a new trial.

Third. Said Circuit Court of Appeals erred in not sustaining the assignment of errors upon the record in said cause.

Fourth. Said Circuit Court of Appeals erred in sustaining the Circuit Court of the United States aforesaid in directing the jury *that* upon the undisputed facts in the case to render a verdict for the defendant in error.

The undisputed facts in this case are that the defendant railway company had no depot for the reception of cotton in Texarkana, but it received its cotton on the platform of the Union Compress Co., situated on the Texas side of the State line; that plaintiffs placed their cotton upon said platform and took therefor receipts from the Compress company. Plaintiffs then took these receipts to the office of the defendant railway company, situated in the state of Arkansas, and, upon giving them up to the agent of the defendant, received a duly signed bill of lading, obligating the defendant railway company to transport the cotton to Utica, N. Y., reserving the right to compress the cotton, at its own expense at any point. After executing and delivering said bill of lading the defendant railway company directed the Compress company in writing to compress and ship said cotton by the Iron Mountain railroad, surrendering the receipts of the compress company with this order. The defendant railway company also directed the compress company to insure the cotton for the protection of the railway company, which was done.

Acting under the instructions of the defendant railway company the compress company separated the cotton of the plaintiffs from other cotton on the platform, and removed it to a point in front of the machine used to compress cotton, preparatory to compressing same, where it was when destroyed by fire.

The compress company piled a large quantity of baggage at a point in the vicinity of this cotton, where it was exposed to sparks

from passing engines, in an uncovered and unprotected condition; that it had no watchman on the platform and that the ordinary mechanical appliances for extinguishing fires were in such condition as to be practically useless and that this bagging caught fire from a passing train, resulting in the destruction of this cotton.

There was also in said bill of lading a provision exempting the defendant railway company from the ordinary liability of losses by fire. The railroad company had but one form of bill of lading. The plaintiffs had on other occasions asked for bills of lading not having this exemption and had been refused. They considered themselves compelled to accept this bill of lading, with the exemption aforesaid.

Fifth. Said Circuit Court of Appeals erred in rendering judgment against plaintiffs in error and in favor of said defendant in error for costs of suit in said Circuit Court of Appeals.

Wherefore, the said William A. Arthur & Co., plaintiffs in error, pray that for the errors aforesaid and other errors appearing in the record of said Circuit Court of Appeals in the above entitled cause to the prejudice of the plaintiffs in error the said judgment of the said United States Circuit Court of Appeals be reversed, annulled and set at naught, and that said cause be remanded to the United States Circuit Court for the Western District of Arkansas, with instructions to grant a new trial in said cause, or for such other proceedings in said cause as may be determined upon by this honorable court, to the end that justice may be done in the premises.

JAMES K. JONES,
*Attorney for Plaintiffs in Error.*

(Endorsed:) No. 2044. W. A. Arthur & Co., Plaintiffs in Error *versus* Texas & Pacific Railway Co., Defendant in Error. Assignment of Errors. Filed Dec. 8, 1905, John D. Jordan, Clerk. James K. Jones, for Plaintiffs in Error.

*(Bond on Writ of Error.)*

And on the eighth day of December, A. D. 1905, a bond on writ of error was filed in the Clerk's office of said Circuit Court of Appeals in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

No. 2044.

W. A. ARTHUR & Co., Plaintiffs in Error,
*vs.*
TEXAS & PACIFIC RAILWAY Co., Defendants in Error.

Bond.

Know all men by these presents, that we, W. A. Arthur & Co. as principals, and E. K. Smith and F. W. Offenhauser as sureties,

are held and firmly bound unto the Texas & Pacific Railway Company in the full and just sum of Five Hundred Dollars, to be paid to the said Texas & Pacific Railway Company, its successors and assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally.

Signed, this November —, 1905.

Whereas lately at a session of the United States Circuit Court of Appeals for the Eighth Circuit holding sessions in St. Louis, Missouri, in a suit depending in said court between the said W. A. Arthur & Co., plantiff- in error, and the said Texas & Pacific Railway Company, defendant in error, a judgment was rendered against the said W. A. Arthur & Co., and the said W. A. Arthur & Co. having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Texas & Pacific Railway Company citing and admonishing it to be and appear before the Supreme Court of the United States to be holden at Washington, District of Columbia, within thirty days from the date thereof.

Now the condition of the above obligation is such that if the said W. A. Arthur & Co. shall prosecute said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation is to be void; else to remain in full force and virtue.

W. A. ARTHUR & CO.,
By W. H. ARNOLD, *Att'y.*
E. K. SMITH.
F. W. OFFENHAUSER.

Approved Dec. 6th, 1905.
DAVID J. BREWER, *Judge.*

STATE OF ARKANSAS, *County of Miller:*

F. W. Offenhauser states on oath that he is a resident citizen of the State of Arkansas and owns property in excess of his debts and exemptions to more than $500.00.

F. W. OFFENHAUSER.

Subscribed and sworn to before me, this November 22nd, 1905.
G. G. POPE,
[SEAL.] *Notary Public, Miller Co., Ark.*

My Com. Exp. May 26, 1907.

(Endorsed:) No. 2044. W. A. Arthur & Co., Plaintiff- in Error *versus* Texas & Pacific Ry. Co., Defendant in Error. Bond. Filed Dec. 8, 1905, John D. Jordan, Clerk. James K. Jones, for Plantiffs in Error.

*(Writ of Error.)*

And on the eighth day of December, A. D. 1905, a writ of error was filed in the Clerk's office of said Circuit Court of Appeals, the original of which with the Clerk's return endorsed thereon is hereto attached and herewith returned.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between W. A. Arthur and John C. Ware, partners as W. A. Arthur & Co., plaintiffs in error, and Texas & Pacific Railway Company, defendant in error, a manifest error hath happened, to the great damage of the said plaintiffs in error as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 6th day of December, in the year of our Lord one thousand nine hundred and five.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
*Clerk of the Supreme Court of the United States.*

Allowed by

DAVID J. BREWER,
*Associate Justice of the Supreme Court of the United States.*

[Endorsed:] No. 2044. W. A. Arthur, *et al.*, Pl'ffs in Error, *vs.* Texas & Pacific Railway Company. Writ of Error. Filed Dec. 8, 1905. John D. Jordan, Clerk.

*Return to Writ.*

UNITED STATES OF AMERICA, *Eighth Circuit, ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name, and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-ninth day of December, A. D. 1905.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
*Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.*

(*Citation.*)

And on the twenty-ninth day of December, A. D. 1905, a citation was filed in the Clerk's office of said Circuit Court of Appeals in said cause, the original of which with proof of service endorsed thereon is hereto attached and herewith returned.

UNITED STATES OF AMERICA, *ss:*

To Texas & Pacific Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Eighth Circuit wherein W. A. Arthur and John C. Ware, partners as W. A. Arthur & Co., are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable David J. Brewer, Associate Justice of the Supreme Court of the United States, this 6th day of December, in the year of our Lord one thousand nine hundred and five.

DAVID J. BREWER,
*Associate Justice of the Supreme Court of the United States.*

On this 12th day of December, in the year of our Lord one thousand nine hundred and five, personally appeared W. H. Arnold before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Hiram Glass, the attorney of record for the Texas & Pacific Ry. Co. in the Circuit Court of the United States for the Western District of Arkansas, and also in the United

States circuit court of appeals for the Eighth circuit in the case of W. A. Arthur & Co. *v.* Texas & Pacific Ry. Co.

W. H. ARNOLD.

Sworn to and subscribed the 12th day of December, A. D. 1905.

[Seal Notary Public, Miller County, Ark.]

G. G. POPE,
*Notary Public, Miller Co., Ark.*

My Com. Exp. May 26, 1907.

[Endorsed:] No. 2044. W. A. Arthur and Co. *et al.* Pl'ffs in Error *vs.* Texas and Pacific Ry. Co. Citation. Filed Dec. 29, 1905. John D. Jordan, Clerk.

*(Clerk's Certificate.)*

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing one hundred thirty-two pages contain full, true and complete copies of all the pleadings, proceedings and record entries, including the opinion of said Circuit Court of Appeals, in a certain cause in said Court wherein W. A. Arthur and John C. Ware, partners as W. A. Arthur & Co., were Plaintiffs in Error, and the Texas and Pacific Railway Company was Defendant in Error, No. 2044, May Term, 1905, as full, true and complete as the same remain on file and of record in my office.

I do further certify that the original writ of error with the Clerk's return thereto and the original citation with proof of service endorsed thereon are hereto attached and herewith returned.

I do further certify that on the fifteenth day of July, A. D. 1905, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the Judges of the Circuit Court of the United States for the Western District of Arkansas.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Circuit Court of Appeals, at office in the City of St. Louis, Missouri, in the Eighth Circuit, this twenty-ninth day of December, A. D. 1905.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
*Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.*

Endorsed on cover: File No. 20,029. U. S. circuit court of appeals, 8th circuit. Term No. 527. W. A. Arthur and John C. Ware, partners as W. A. Arthur & Co., plaintiffs in error, *vs.* Texas & Pacific Railway Company. Filed January 2d, 1906. File No. 20,029.

FILE COPY.

Office Supreme Court, U. S.
FILED.
JAN 4 1907
JAMES H. McKENNEY,
CLERK

# Supreme Court of the United States.

OCTOBER TERM, 1906.

## No. 176.

WILLIAM A. ARTHUR & CO., PLAINTIFFS IN ERROR,

*vs.*

TEXAS & PACIFIC RAILWAY CO., DEFENDANTS IN ERROR.

# Brief for Plaintiffs in Error.

JAMES K. JONES,
JAMES K. JONES, JR.,
*Attorneys for Plaintiffs in Error.*

# Supreme Court of the United States.

OCTOBER TERM, 1906.

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WILLIAM A. ARTHUR & Co., Plaintiffs in Error,
vs.
TEXAS & PACIFIC RAILWAY Co., Defendants in Error.
No. 176.

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## BRIEF FOR PLAINTIFFS IN ERROR.

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### Statement.

This cause is brought into this honorable court by writ of error to the United States circuit court of appeals for the eighth circuit.

The suit is for $2,605.53, the value of fifty bales of cotton delivered to the Texas & Pacific Railway Company by William A. Arthur & Company, of Texarkana, Arkansas, to be transported under a bill of lading from Texarkana, Texas, to Utica, N. Y.

The defendant railway company had no depot for the reception of cotton in Texarkana, but it received its cotton on the platform of the Union Compress Company, situated on the Texas side of the State line; plaintiffs placed their cotton upon said platform and took therefor

receipts from the compress company. Plaintiffs then took these receipts to the office of the defendant railway company, situated in the State of Arkansas, and, upon giving them up to the agent of the defendant, received a duly signed bill of lading, obligating the defendant railway company to transport the cotton to Utica, N. Y., reserving the right to compress the cotton, at its own expense, at any point. After executing and delivering said bill of lading the defendant railway company directed the compress company in writing to compress and ship said cotton by the Iron Mountain Railroad, surrendering the receipts of the compress company given to plaintiffs, with this order, and receiving from the compress company receipts for the cotton to the defendant railway company. The defendant railway company also directed the compress company to insure the cotton for the protection of the railway company, which was done, and the policies were delivered to the company's agent.

Acting under the instructions of the defendant railway company to compress this cotton the compress company separated the cotton of the plaintiffs from other cotton on the platform, and removed it to a point in front of the machine used to compress cotton, preparatory to compressing same, where it was destroyed by fire.

There was a large quantity of bagging at a point in the vicinity of this cotton, where it was exposed to sparks from passing engines, in an uncovered and unprotected condition. There was no watchman on the platform and the mechanical appliances for extinguishing fires were in such condition as to be practically useless. This

bagging caught fire from a passing train, resulting in the destruction of the cotton.

There was in the bill of lading a provision exempting the defendant railway company from the ordinary liability of losses by fire in the following words:

> "That neither the Texas & Pacific Railway Co., nor any connecting carrier handling said cotton, shall be liable for damage to or destruction of said cotton by fire, nor for any loss thereof or damage thereto by causes beyond its control."

The railroad company had but one form of bill of lading. The plaintiffs had on other occasions asked for bills of lading not having this exemption and had been refused. They considered themselves compelled to accept this bill of lading, with the exemption as aforesaid.

The complaint alleged that although the defendant had no line of railway extending from Texarkana to Utica, it held itself out as common carrier to Utica; that by virtue of a partnership and traffic agreement for the division of revenues between the Texas & Pacific Railway Co., and connecting carriers between Texarkana and Utica, the said Texas & Pacific Railway Co., was authorized by all the carriers over whose lines said cotton would be shipped to give a bill of lading for said cotton; and said defendant by virtue of its arrangements with said intervening carriers held itself out to the public and to the cotton shippers as a common carrier from Texarkana to Utica, and so represented itself to be when the fifty bales of cotton were tendered to and received by it. The complaint further alleged that the provision in the bill

of lading exempting defendant from loss by fire was void, because (1) it was received by the plaintiffs under duress, (2) said provision was unreasonable, and (3) it was without consideration. The freight rates charged were the regular rates for the shipment of cotton from Texarkana to Utica, and no option was offered to plaintiffs to receive any other form of bill of lading, and plaintiffs did not assent thereto. The cotton was received by the defendant September 17, 1900, and was destroyed by fire on the platform of the Union Compress Co. in Texarkana, Texas, where said company received it on the 19th day of September, 1900.

The plaintiffs further alleged that immediately after said cotton was received by the defendant to be shipped to Utica, said defendant delivered the cotton to the Union Compress Co., as its agent, for the purpose of having it compressed for the convenience of the defendant in handling the same; that said Union Express Co.'s platform was not a safe place on which to keep cotton; that it was not inclosed, and no provision was made to prevent the destruction of said cotton by fire; that said compress company, while so acting as agent for the defendant, failed to provide suitable or proper apparatus for putting out fires, and failed to keep watch to prevent said cotton from being destroyed by fire, and on the 19th day of September, 1900, while said cotton was exposed and the employees of said compress company, the agent of the defendant, were neglecting to care for said cotton, it caught fire from sparks from a passing engine and was destroyed.

The defendant pleaded as a defense the fire exemption

clause in the bill of lading. The consideration shown by the bill of lading reads:

> "In consideration of the rate of freight herein named, it is hereby stipulated, etc."

The bill of lading also contains the following stipulation:

> "Each carrier over whose route the cotton is to be carried hereunder shall have the privilege, at its own cost, of compressing same for greater convenience in handling and forwarding, and shall not be responsible for deviation or unavoidable delays in procuring such compression."

The answer admitted that defendant was authorized and empowered to execute said bill of lading for the shipment of cotton from Texarkana, Texas, to Utica, N. Y., and did not deny that defendant had traffic arrangements with connecting carriers between Texarkana and Utica whereby a division of freight was agreed upon and the defendant was authorized by said connecting carriers to execute said bill of lading. And defendant did not deny the allegation of the complaint that by virtue of defendant's arrangements with intervening carriers, defendant held itself out to the public and to cotton shippers as a common carrier from Texarkana to Utica, and so represented itself to be when the fifty bales of cotton was tendered to and received by it; but did deny that it was a partner with said connecting carriers.

Defendant denied that said freight rates charged and stipulated for in said contract was the only rate on said

cotton from Texarkana, Texas, to Utica, N. Y., and denied that no option was given to said plaintiffs to ship cotton without exempting said defendant from liability for loss of cotton by fire, and denied that defendant acted as agent for the St. Louis, Iron Mountain & Southern Ry. Co., or any other carrier, in making the contract set up in the complaint, except to guarantee the through rate of freight.

Defendant denied that it delivered the cotton into the custody of the compress company, but alleged that the same was delivered to the said company by the plaintiffs and was tendered to the defendant on said platforms by the plaintiffs, and denied that it made said compress company its agent for the purpose of having the cotton compressed and denied the acts of negligence set up in the complaint. The sixth paragraph of the answer contains the following:

> "That said cotton was received by defendant to be shipped under said bill of lading and written contract which, among other things, specially stipulated that the liability of the Texas & Pacific Railway Co., in respect to said cotton, was limited to its own line of railway, and it shall not be liable for any loss, detriment or damage done to or sustained by said cotton not occurring on its own road, nor after said cotton has been delivered, or is ready for delivery, to the next connecting carrier or consignee."

Defendant further pleaded that at the time of the execution of said bill of lading and the loss and destruc-

tion of said cotton, it neither owned or controlled any line of railway in Arkansas; that its entire line was in Texas and that the compress at which said cotton was delivered is located a few hundred yards west of the line between Texas and Arkansas, and that defendant's line only extends to the said State line in the direction in which said cotton was to be transported; that the cotton was placed with said compress company and there tendered to the defendant, and the said bill of lading and contract was then and there executed; that under the laws of said State of Texas, where said cotton was then and there situate, and under the rules and regulations of the defendant, which were reasonable, it was then and there the duty of the defendant to give a bill of lading for such cotton when so tendered to it in the manner or on the same terms it would receive and receipt for cotton if tendered at its own platform assigned by it for such transactions, and that under said laws and said rules and regulations, when said cotton is so tendered upon the platforms of the compress company where said compress is situated on the tracks of said railroad, the shipper assumes the risk of insurance involved by said act of the railway company, and assumes the risk of said cotton being lost by any agency whatever except it be the negligence of the railroad company.

## Specification of Errors.

The trial court was in error in that—

I.

Its judgment was contrary to law.

II.

Its judgment was contrary to the evidence.

III.

Its judgment was contrary to the law and the evidence.

IV.

In directing the jury upon the undisputed facts of the case, to render a verdict for the defendant.

The Circuit Court of Appeals was in error—

I.

In entering a judgment affirming the judgment of the Circuit Court of the United States for the Western District of Arkansas in favor of the defendant in error.

II.

In not reversing the said judgment of the United States Circuit Court for the Western District of Arkansas, and in not remanding said case to said circuit court for a new trial.

III.

In not sustaining the assignment of errors upon the record in said cause.

IV.

In sustaining the action of the Circuit Court of the United States for the Western District of Arkansas in directing the jury, upon the undisputed facts in the case, to render a verdict for the defendant in error.

V.

In rendering judgment against plaintiffs in error and in favor of defendant in error for the costs of suit.

Reduced to concrete propositions, the Circuit Court of Appeals for the Western District of Arkansas was in error—

I.

In not adjudging that there was a delivery of the cotton to the railway company, so complete as to entirely remove it from the supervision or control of the plaintiffs in error, and to absolve the plaintiffs in error from any liability regarding it, except that which might result from the acts of God or the public enemy.

II.

In not holding that under the regulations and practice of the railway company plaintiffs in error were compelled to accept from the railway company the bill of lading which contained the exemption against liability for the loss by fire, and had not the option to select a bill of lading which did not contain such exemption; and that because of such duress the plaintiff in error was not bound by the exemption, and the defendant in error was liable notwithstanding the exemption.

III.

In not holding that the railway company was guilty of such negligence after the delivery of the cotton to it as made it liable for its destruction by fire.

IV.

In not holding that the stipulation of exemption from liability for loss by fire, if valid, was inoperative while the cotton remained on the platforms of the compress company, by direction of the railway company, for compression, as a matter of convenience to the company.

V.

In not holding that the delivery of the cotton by the railway company to the compress company to be compressed for the sole benefit of the railway company, made the compress company the agent of the railway company, and that for the acts of said agent, negligent or otherwise, resulting in loss to the plaintiff in error, the railway company was liable.

VI.

In not holding that the regulation of the railway commission of Texas had no application to the contract between the plaintiff in error and the railway company, and furnished no immunity to the railway company against liability.

VII.

And finally, in not submitting each question of fact indicated in the foregoing specifications for the determination of the jury.

**Evidence of Delivery to Railway Company.**

While there seems to be no specific denial in the pleadings that the cotton sued for was actually delivered to the railway company, this delivery was in effect denied when the defendant denied that it had delivered the cotton to the compress company and denied that it made the compress company its agent for the compression of the cotton.

John C. Ware testified that W. A. Arthur & Co. delivered to the Union Compress Co. fifty bales of cotton and received compress receipt or receipts therefor; that subsequently on September 17, 1900, he took the compress receipts to the agent of the Texas & Pacific Railway Co., and surrendered them and received the bill of lading. R., 13.

The Texas & Pacific Railway Co., had no other place in Texarkana to receive cotton except at the Union Compress Co's platform. R. 15. We were not permitted to route the cotton and I did not ask that it be shipped over the Iron Mountain. R., 19.

We had nothing to do with the compression of the cotton. It was for the convenience of the railway company. The compression would be of no advantage to us. R., 20. We had no agreement at all with the compress company for compressing the cotton, and I do not know whether the compress company was in the habit of compressing all the cotton we shipped out, as we had nothing to do with it. The Texas & Pacific Railway Co. has no platforms on which to receive cotton, and the plat-

forms of the compress company is the regular and only place on which the Texas & Pacific Railway Co., received cotton for shipment. R., 21. After the cotton was shipped to the order of W. A. Arthur & Co., Utica, N. Y., "notify Utica Steam Cotton Mills," the draft for the price of the cotton was attached to bill of lading and delivered to the bank for collection, and when we ascertained that the cotton had been destroyed, we took up the draft. R., 18–22. The concentration of the cotton at the compress was a mutual advantage to ourselves and the railroad. R., 24. Our buyers were instructed to ship the cotton to the compress. It is more convenient in a general way to do so, as we can look after it and keep it thoroughly insured, and have it classified. R., 22. The advantage of concentration of the cotton at the compress was mutually beneficial to the railway company and to ourselves. R., 25.

V. E. Buron testified that he was chief clerk of the Texas & Pacific Railway Co. in the Texarkana local freight office, and signed the bill of lading for the fifty bales of cotton in controversy. All cotton to be shipped over the Texas & Pacific Railway Co. was received at the Union Compress and was usually there when we signed the bills of lading for it. That was the only place that was prepared for the reception of cotton. The plaintiffs delivered me the compress receipts for these fifty bales and I signed the bill of lading and gave the compress instructions as to loading and cancelled those compress receipts. R., 37. We send the cotton duplicates or compress receipts to the compress and they tear out the

perforated part and sign in a book. In this case the railway company got a receipt for the cotton from the compress in regular form. R., 38. The witness further testified that the form of the order given by the railway company to the compress company for compression and shipment was as follows:

*I have this day issued on your compress receipt bill of lading to*.....for..... bales of cotton, marked..... .....No. of bales.. ... ..... , weight .....*Compress and ship above cotton* by the... ..... railroad for account of.....

_____

Agent.

Record, 91.

The bill of lading in this case shows the cotton was marked C. O. T. S.; weight 25,358 pounds. R., 10.

Witness also testified that if cotton had been tendered at the local platform instead of the compress platform he did not know what they would have done, but would have had to receive it and send it to the compress. We could not very well handle it at the local merchants' platform. R., 92. That when cotton was ordered to be shipped from the compress by the railway company after issuing bills of lading, it took up the compress receipts and the railway company would direct and authorize the compression and shipment of the cotton by a certain form. R., 92.

As soon as I issued the bill of lading for the cotton we wired the general office at Dallas for instructions, and

the agent gave us the instructions. The compress company took out insurance on this cotton, which also included all cotton for which bills of lading were issued for the benefit of the Texas & Pacific Ry. Co., and the policies were delivered to Mr. Hovey, the agent of the railway. It was customary for the compress company to carry the insurance for the benefit of the railway company. I made it a business to go to the compress every ten days. I was at the compress the day this bill of lading was issued or the day after. I made it a business to check how much cotton there was at the compress and if I noticed there was not sufficient insurance I had it increased at once. R., 39.

George West, manager of the compress company, testified, corroborating the testimony of Mr. Buron, that when bills of lading were issued for cotton the compress receipts were surrendered by the shipper to the agent of the railway company and by the railway company to the compress company, and a form of instructions was signed by the railway company's agent directing the compress company to compress and ship the cotton. R., 93. In this instance, as we always do, we got a shipping list, but we got those instructions (for compression) from the railroad company. We got what we call a shipping list from the owners of the cotton, but prior to the receipt of that (the order to compress) and immediately upon receipt of the shipping list we spotted or tagged the cotton which is covered by that shipping list and moved it to its place in front of the press preparatory to being pressed and shipped as per those directions (of the railway com-

pany). That was done in this particular instance. We were going to make a run the next day. R., 93–4. In some instances the cotton was carried around to the press before we got the directions (from the railway company); but I do not know whether it occurred in this particular case. The shippers merely give us a shipping list saying which cotton they want shipped and the railroad people give the shipping-directions. The shippers gave us the ticket numbers of a certain lot of cotton which might be shipped under that mark and the railroad company then told us to ship under those directions 100 or 150 bales as the case may be, and mark it as that form there reads. This fifty bales was worked up from all points of the platforms and stacked for the purpose of compressing. R., 94.

Witness was not able to state whether or not the directions from the railway to compress and ship were given to him before the shipping list was furnished by the owners; but both occurred before the fire as the cotton was identified and carried around to the press for compression and thereby separated from the mass of cotton. It is immaterial whether the directions were given by the railway before or after the shipping list was handed to the compress company's agent. The facts are undisputed that the railway company directed the compress company to compress the fifty bales and took a receipt from the compress company for the cotton, the shipping list was furnished by the owners and the cotton was identified and carried to the press with a view of compression for account of the railway company, then the fire.

## Evidence of Negligence.

The diagram of the compress platforms (R., 55) shows that there were railroads on three sides of the platforms. On the north the track of the Texas & Pacific; west, the Kansas City Southern, and on the south the St. Louis Southwestern Ry. Co. The platforms on the north were 350 to 400 feet long; west, 350 to 400, and on the south 400 to 600 feet.

The platforms are uninclosed and there is no shed over any part of it except a small shed near the compress 100 by 200 feet, and the shed is uninclosed. The fire started on the southwest corner of the platforms and must have caught from sparks of an engine passing along the Cotton Belt Railway.

Mose Wagner, one of the employees of the compress company, testified that at the time of the fire there were 1,200 or 1,300 bales of cotton on the platforms and hardly any of it under the shed. There was a covered shed at the compress and boiler room. The greater part of the cotton was not under the shed. The fire caught about half past twelve o'clock in the day time. There were five persons at the platforms and they were eating at the time the fire occurred. Mr. West, the manager, had gone home to dinner, and Mr. Statti was in the office. While we were at dinner a freight train passed on the track of the St. Louis Southwestern Railway Co., and a switch engine on the K. C. P. & S. We all remained at dinner until we noticed the fire. Some one of them made a remark that there was a fire at the far end of the

building and I ran down there and called to the boys to take out the hose and I stayed there until they got the hose stretched out, but we could not find the nozzle and the hose could not be used successfully. The nozzle was found afterwards, but not in time to be used at the fire. The fire occurred after those trains went by. The cotton on the platforms had caught several times before that. The fire caught about 40 or 50 yards from where we were sitting. Mr. Statti was the only white man present and he was in the office asleep. There was nothing kept about the platforms to throw over the cotton as a covering. Trains were passing all the time along the several railroads and I have frequently noticed sparks come from the engines. I do not think any person had been around where the fire originated for quite awhile before the fire was discovered, and I know that I did not go around there after the trains passed. The wind was blowing pretty high from the southwest (R., 45–8)

Chess Baker testified that when the bell rang for dinner, the four employees met in the center of the building at the press and began eating dinner. The nozzle was off the hose when they tried to use it on the fire and failed to use it for a few minutes. We found the nozzle in the frame of the press, on the shed. I happened to know it was there. In the morning we were washing out the boilers, and I saw it there, and I made for the nozzle. The witness indicated on the diagram the fire plugs 140 feet apart. Witness testified that the nozzle was right opposite the lower plug, and he had to go that distance to get it and carry it back to plug on the south

side before the hose could be used (R., 63). After I screwed on the nozzle it was too late to use it. I noticed trains go by when we were at dinner. One went south on the Cotton Belt right up grade. It was puffing, and there was a heavy load. I did not notice any sparks that day, but I have at day and night, too. We saw the train go by. After the train went by we kept on eating until we saw the fire. I do not know that it was anybody's business to go around looking after trains passed. I had not been so directed, and I did not notice any person going around and looking after the trains passed (R., 64).

Harry Gaither testified that the hands were all at dinner about the press, and a freight train passed on the south side. The fire broke out after twenty minutes or half an hour. The nozzle of the hose was gone. "Baker tried to find it, I think, and he did find it, and I went down where I could work on the other hose; by that time the fire was under way and we got safe." (R., 87).

Jim Murphy testified that it was 50 or 75 yards to where the fire broke out on the southwest corner of the building. He was the first to discover the fire. We had the hose stretched out, but the nozzle was not there. I noticed one train and a switch engine pass twenty or thirty minutes before the fire, and we kept on eating our dinner (R., 88).

George West testified that the shed at the platforms had corrugated iron roof, and the side extended within six or seven feet of floor, and was open all around with the exception of oplacene, about the middle of the shed,

which was closed in (R., 52). The shed did not cover more than one-fourth of the platform. There were two fire plugs on the platforms at the time, and a small three-quarter inch plug used right by the press for drinking water, and we had a hose attached to it for fire protection. Witness identified the diagram referred to as being correct. The plugs were 140 feet apart. A new press has been built, and the building and platforms are quite different from what the other was. There had been fires before which were put out. There were quite a good many for a year after I first came down here.

I think that this particular location is a little more dangerous than a good many other compresses on account of the proximity of the railroads there.

Q. What was necessary, if anything, to make it a reasonably safe place? A. There were lots of things. The shed could have been enlarged and more hydrants could have been placed.

Q. What about the enclosure of the shed? A. The enclosure of the shed as it stood then?

Q. Yes, sir. A. I don't think it could have added a bit to it.

Q. Why? A. Because there was cotton on the open platforms at all times that would be much nearer exposure from fires from the engines than that cotton could possibly have been under the shed, and at all times the cotton would have been exposed to railroads.

Q. In other words, could you not remodel that shed so as to help the situation? A. I don't think it would.

Q. It would have been necessary to have a larger shed? A. Yes, sir (R., 50–4).

Owing to the location of the railroads this compress was more hazardous than the usual run of compresses, as they are not usually situated as near the main lines as this one.

The compress at Little Rock was protected better in every way. It was not as near to any main line of railroad, and not as near to as many lines. The Union Compress Company's building at Little Rock had a brick fire wall on the platforms close to one of the main railroads which passed there, and it was not over 20 feet wide. The Union Compress Company's building here on the K. C. S. side I think must have been 60 feet of open platform between the shed and the side track, and on the Cotton Belt on the south it was 60 or 75 feet, and on the Texas & Pacific it averaged from 60 to 100 feet. None of these platforms, ranging all around from 60 to 100 feet, were inclosed, nor covered by shed. Witness did not know anything about the compresses at Shreveport or Ft. Smith (R., 60–1). The compresses at Hope and Newport were better protected. The exposures of the Union Compress Company's sheds here were greater than at Hope or Newport (R., 61).

**Evidence of Duress.**

In the pleadings it is not denied that the Texas & Pacific Ry. Co. held itself out as a common carrier of cotton from Texarkana to Utica, but the answer denied that the rate of freight charged was the only rate that would have been quoted to plaintiffs if they had demanded a common law form of bill of lading, and de-

nies that no option was given to defendant to receive a different form of bill of lading than that executed.

H. L. Redfield testified on behalf of the railway company that the defendant would have issued a bill of lading to Utica, N. Y., without any limitation whatever, that the company would have undertaken to transport the cotton as an insurer (R., 80). This strongly sustains plaintiffs' contention that defendant held itself out to the public as a common carrier from Texarkana to Utica, although it did not have a line of railway to that point. The proof on the part of the plaintiffs shows that if the railway company had a rate of freight for which they would have issued a through bill of lading without limitation, no one was authorized to quote it except the general officers of the company at Dallas (R., 81).

C. P. Hovey, agent of the railway company, testified that the Texas & Pacific Railway Co. issued only three forms of bills of lading for the shipment of cotton The inter-state cotton bill of lading (R., 10); the domestic cotton bill of lading (R., 33), and the export cotton bill of lading (R., 35). The first named was for the shipment of cotton out of the State of Texas; the domestic was for the shipment of cotton between points in Texas, and the third was for foreign shipments, all of which had substantially the same clauses exempting the company from loss of cotton by fire as well as the other limitations in the bill of lading. Mr. Hovey testified that these forms of bills of lading for the shipment of cotton were the only form that he was authorized to deliver to shippers (R., 30). He further testified that he was not au-

thorized to quote any different rate of freight to shippers of cotton than that furnished to plaintiffs, nor was he authorized to strike any of the conditions out of the bills of lading (R., 29).

John C. Ware testified that he had been shipping cotton for several years and that he knew the regular rate of freight over the railroads; including thedefendan t's rate, from Texarkana to Utica, N. Y., and that the only rate was 85 cents per hundred, the rate which plaintiffs paid in this case. He testified further that he knew the form of bill of lading under which this shipment was made, being an inter-state shipment, was the only form which the defendant would execute, and 85 cents, was the regular published rate, and further that he knew that it was useless to request the agent of the company to furnish him a different form on a different rate, as at different times he had asked that certain small clauses should be eliminated from the bills of lading and had asked the privilege of routing the cotton, which were refused, and he knew that such a request would be useless (R., 9-16).

The tariff book was introduced in evidence which was furnished to the plaintiffs by the agent of the Texas & Pacific Ry. Co., dated August 31, 1900, issued by the Southwestern Freight Committee, the first sheet of which shows that it was the Southwestern Freight Committee Arbitraries, of St. Louis, Iron Mountain & Southern Ry. Co., and nine other railroads with the Texas & Pacific Railway Co., and forty-two other railway companies dated at St. Louis, August 31, 1900, effective September

6, 1900, applicable on cotton shipped from East St. Louis, Ill., to Utica, N. Y., and among the signatures is E. L. Sargent, general freight agent of the Texas & Pacific Ry. Co. On page three is given the rate of 25 cents per hundred pounds from East St. Louis, Ill., to Utica, N. Y., on through bills of lading (R., 101). Ware testified that the rate from Texarkana to St. Louis was 60 cents per hundred, which added to the freight from East St. Louis made 85 cents per hundred pounds (R., 15). Witness further testified, after he heard the testimony of Mr. Redfield, the assistant general freight agent at the Dallas office, in regard to there being another rate for the shipments of cotton to Utica than that which he had paid, that he had never heard of it; he had handled the tariffs here for eight or ten years and had every season requested all the roads at Texarkana to furnish him their tariffs and that the only rate that had been furnished him from Texarkana to Utica was the 85 cent rate.

W. A. Arthur, one of the plaintiffs, testified that he had been shipping cotton over the Texas & Pacific Ry. Co. about twelve years, and knew that the company always had the fire clause in its bills of lading, and that in several instances prior to the issuance of this bill of lading he had tried to erase the fire clause from the bills of lading, but the agents of the company refused to let him do so. This attempt was made with the agents of the defendant at Franklin and Paris, Texas, and at Texarkana. When the railroad company put a clause in the bill of lading and insisted on it, we had to take

it. We made protest against the form, but not to this particular bill of lading, and finally we got so that we accepted the form under protest (R., 26–9).

V. E. Buron, chief clerk of the defendant's freight office, testified that he was familiar with the freight rates of the Texas & Pacific Ry. Co., and that the charges of freight in the bill of lading in question was the regular published freight rate for the shipment of cotton to Utica, which was filed there for public inspection (R., 39). His general instructions were to sign bill of lading to Utica, N. Y., and witness did not question the fact that the company held itself out as being able to ship the cotton to Utica. I simply had instructions from the railroad company that they had the published rate to Utica. Of course, that was sufficient authority for us to sign the bill of lading. I understood that there were tariff arrangements between the connecting carriers (R., 40). I had no authority to sign the bill of lading with any of the clauses eliminated.

Witness testified that he would have had no authority to execute a bill of lading other than that issued without instructions from the Dallas office, and that he had no such instructions (R., 40).

On cross-examination, the witness testified that it was his understanding that there was another rate, but in one part of his testimony he thought it was a higher rate and in another he did not know whether it was or not. He could not state without examining the tariffs (R., 40).

On redirect-examination, he referred to the tariff book

testified to by Ware and Arthur showing the rate of freight from East St. Louis to Utica, and identified the same as the book furnished to shippers for information as to rates.

> Q. Then they had no other tariff rates for cotton except these? (referring to tariff rate pamphlet). A. I think this tariff they have mentioned here has a cotton rate in it that was much higher than the other; but they used always the lowest rate.
>
> Q. Is this the only form of a bill of lading you were authorized to issue. A. That is the—that on interstate shipments.

He further testified that if a shipper had demanded that his cotton be shipped without limitation as to the fire clause he would have wired to the Dallas office for instructions. He had no authority to do anything without given instructions from headquarters (R., 45).

H. L. Redfield, assistant general freight agent of the defendant, testified that defendant had a rate on the shipment of cotton to Utica, N. Y., of $1.37 per hundred pounds; that the 85 cent rate applied to cotton shipped under bills of lading; that the railway company had what was called a class rate and a commodity rate on cotton. The special or commodity rate for cotton shipments has certain requirements as to bills of lading and the class has no requirements of that kind. Witness explained that the commodity rate was 85 cents while the class rate would be $1.37 (R.; 78–9). Witness testified, however (R., 80) that he did not know whether the defendant would have made a notation about goods being

received at carrier's risk where shipment was made on the $1.37 rate and that the company had no form of bill of lading to apply to that rate of shipments and had no other form of bill of lading than that furnished to the agent (R., 85).

> "Agent would not have been given instructions to alter the bill of lading from the commodity rate for the shipment of cotton" (R., 81).

> Q. You have no other form of bill of lading for this class of shipments of cotton you refer to? (meaning under the higher rate). A. We have no form for the reason that it has never been asked (R., 85).

Mr. Redfield testified that the rate of frieght under bills of lading for cotton to St. Louis was 60 cents, from St. Louis to Utica 25 cents, and that the advantage to the Texas & Pacific Ry. Co., in securing the cotton as the initial carrier was $1.50 per bale after all the expenses were paid, although defendant did not transport the cotton any part of the way (R., 84).

F. W. Offenhauser testified that he was an insurance agent in Texarkana at and before the time the cotton was destroyed by fire and that the Union Compress Co., had taken out insurance for the benefit of the Texas & Pacific Ry. Co., against loss by fire on the cotton on the company's platforms. The insurance covered "cotton in bales for which bills of lading have been issued by their duly authorized agents and for which they shall be legally liable for loss or damage by fire while contained on the compress company's platforms and in cars

on switches adjacent thereto situate in Texarkana Texas." These policies were delivered to the Texas & Pacific Ry. Co. (R., 66).

**Rules of Texas Railroad Commission.**

Mr. Glass, the attorney for the defendant, testified that the State Railroad Commission of Texas adopted the following rule in reference to receipt of cotton by railroads in Texas located on cotton compress platforms:

> "*Thirteenth.*—When cotton is tendered to railroad companies upon compress platform, which is situated on the track of such railroad companies, it shall be the duty of the railroad companies to take charge of and receipt for such cotton in the same manner and on the same terms as they would receive and receipt for cotton when taken at its own depot or platform erected for such transactions; provided, however, that the shipper or the compress company shall in such cases assume the additional risk of insurance involved by such act of the railroad company" (R., 90).

Defendant also read Rule 11 adopted by the defendant, Texas & Pacific Ry. Co., the language of which is substantially the same as the above rule of the Railroad Commission of texas.

The plaintiffs are cotton buyers and are residents and citizens of Texarkana, Arkansas. They placed their cotton with the Union Compress Co., located in Texarkana, Texas.

Mr. Ware, one of the plaintiffs, testified that he had

no knowledge of the above rules governing the reception and forwarding of cotton (R , 100).

The foregoing statement of evidence introduced at the trial of this cause contains substantially all the testimony upon which the plaintiffs base their suit. Reference is now made to the record itself for a fuller statement.

When the evidence was closed, the court, on motion of the defendant, instructed the jury that upon the undisputed facts in the cause the plaintiffs were not entitled to recover and directed the jury to return a verdict for the defendant, and a verdict was accordingly rendered to which instruction of the court the defendant at the time excepted (R., 103).

The plaintiffs asked and were given ninety days time in which to file their bill of exceptions and said bill of exceptions was duly prepared embodying all the foregoing proceedings at the trial and all the evidence introduced on the part of both parties, including said instruction and was signed by the judge and made a part of the record within the time given (R., 103).

The plaintiffs filed their petition for writ of error, which was granted; also filed their assignment of errors, supersedeas bond, and such proceedings were taken that this cause was regularly before the Honorable Circuit Court of Appeals for the Eighth Circuit, with a view of reversing the judgment of the lower court (R., 104–7).

The error assigned was that the court directed the jury to return a verdict for the defendant (R., 103, 105).

This cause came on to be heard, and on the 16th day of May, 1905, an opinion of the said Circuit Court of Ap-

peals was filed, in which the judgment of the Circuit Court was affirmed with costs.

Plaintiffs filed their petition for writ of error to this Honorable Court, which was granted; also filed their assignment of errors, supersedeas bond, and such proceedings were had that this cause is regularly brought before this court with a view of reversing the judgment of the courts below.

## Summary.

The plaintiffs in error contend for the following propositions in this case.

*First.* That there was a delivery of the cotton to the defendant and an acceptance of the same.

*Second.* That after the receipts of the compress company which had been given to plaintiffs had been delivered up to the defendant railway company and accepted by it and a bill of lading duly issued, and the original receipts given up to the compress company by the railway company and receipts taken to itself, and the compress company directed by the railway company to have the cotton insured for the protection of the railway company, and the policies were taken out accordingly and delivered to the agent of the railway company, and the cotton was held by the compress company under the direct orders of the railway company for compression solely for the convenience of the railway company, the compress company thereby became the employee or agent of the railway company, and the said defendant was responsible for the loss of cotton resulting from the negligence of the said agent or employee.

*Third.* The railway company cannot excuse itself for the loss of the cotton by negligence, on the theory that the compress company was an independent contractor, since the plaintiff's contract was with the railway company alone and there was no contract whatever between the compress company and plaintiff, and the defendant could not avoid its responsibility to the plaintiff by a contract with the compress company to which the plaintiffs were not in any sense a party.

*Fourth.* The stipulation as to loss by fire was void on account of duress.

*Fifth.* The stipulation, if valid, was inoperative while the cotton remained on the compress platforms by the direction of the railway company for compression as a matter of convenience to that company. The contract as to carriage being thereby temporarily suspended.

*Sixth.* The rules of Texas Railway Commission do not effect the merits of this case.

## ARGUMENT.

### The cotton had been delivered and accepted, and the liability of the defendant as a common carrier existed at the time of the fire.

It has been proven that the defendant had no depot for the reception of cotton for shipment except at the platforms of the Union Compress Company The plaintiffs, as was the custom, surrendered their compress receipts to the agent of the railway company on the 17th day of September and took the bill of lading, and on

that day the agent of the railway company telegraphed for instructions to the Dallas office to route the cotton, directed the compress company to insure the cotton for protection of the railway company against loss by fire, which was done and the policies delivered to the company's agent. The company's agent inspected the platform and took a receipt for the cotton from the agent of the compress company after surrendering to him the compress receipts given to plaintiff, and gave the orders in writing for compression and shipment. Subsequently the employees of the compress company selected the cotton from other cotton on the platform and carried it to the press for compression. Afterwards on the 19th day of September it was destroyed by fire. There is no suggestion in the pleadings or in the evidence that the cotton was delivered by plaintiffs on the platforms of the compress company for compression. No order was at any time made by them for the compression of the cotton. This was a matter in which they had not the slightest interest, but it clearly appears that the cotton was placed by them on this platform and receipts taken therefor because this was the only place in Texarkana where the defendant received cotton for shipment.

The shippers had nothing further to do with the shipment after delivery of receipts to defendant and taking the bill of lading. It was the duty of the compress company under its contract with the defendant to load on the cars after compression. The liability of the defendant as a common carrier had attached before the fire, unless it was necessary that the cotton be placed on board the cars to constitute a delivery.

Upon the delivery and acceptance of goods the carrier's liability is the same as when the goods are in transit.

The delivery of goods for shipment to an agent of the carrier duly authorized to receive them, or who is clothed with apparent authority and has been accustomed to receive goods for carriage, is sufficient to bind the carrier. Goods must be tendered at a time and place where the carrier is accustomed to receive freight. A deposit of the goods may amount to a delivery when there is proof of a constant and habitual practice and usage on the part of the carrier to receive goods for transportation when they are deposited for it in a certain place; proof of such practice is sufficient to show a public offer by the carrier to receive in that way, and to constitute an agreement between it and the shipper by which goods when so deposited will be considered having been delivered to it without further formality.

Am. & Eng. Ency. Law, 2d Ed., Vol. 5, page 181–4.
Fratt *v.* Grand Trunk Ry. Co., 95 U. S., 336.

The duty of loading freight of any kind upon cars, rests primarily upon the carrier. It is not necessary to constitute a delivery to a carrier that the goods be loaded upon the cars.

Am. & Eng. Ency. Law, 2d Ed., Vol. 5, page 189.
Bulkley *v.* Naunkeag Steam Cotton Co., 24 How. (U. S.), 386.
Fitchburg, etc., R. Co. *v.* Hanna, 6 Gray (Mass) 541; 66 Am. Dec., 427.

In the case of Mo. Pac. Ry. Co. against McFadden, 154 U. S., 155, the defense of the railway was that the cotton for which the bills of lading were issued was never delivered to the carrier; that by custom or course of dealing between the carrier and McFadden, it was understood by both parties that the cotton was not to be delivered at the time the bills of laden were issued, but was then in the hands of the compress company. The compress company was the agent of the shipper, and that it was the intention of the parties at the time the bills of lading were issued that the cotton should remain in the hands of the compress company, the agent of the shipper, for the purpose of being compressed.

On exception to the foregoing answer, the court said:

> "All allegations in the answer were of course admitted by the exception, and, therefore, the case presents the simple question of whether the carrier is liable for a bill of lading of property which at the time of the issuance of the bill of lading remained in the hands of the shipper for the purpose of being compressed for the shipper's account and whether it was destroyed by fire before the delivery to the carrier has been consummated. The elementary rule is that the liability of the common carrier depends upon the delivery to it of the goods which it is to carry. This rule is stated in the text-books: The liability of the carrier begins when the goods are delivered to him or to his servants authorized to receive them.
>
> "The duties and obligations of common carriers with respect to goods commence with their delivery to them and this delivery must be complete so as to

> put upon him the exclusive duty of seeing to their safety. The law will not divide the duty or obligation between the carrier and the owner of the goods. It must rest entirely upon the one or the other, and until it has become imposed upon the common carrier by delivery and acceptance, he can not be held responsible for them."

This decision turns upon the fact that although the bills of lading had been issued, the cotton still remained with the compress company for the account of the shipper.

In the case at bar the cotton remained with the compress company by order of the railway company, for compression on account of the railway company.

The case of St. Louis, Iron Mountain & Southern Railway Co. *v.* Commercial Insurance Co., 139 U. S., 223, was also strongly relied upon by the defendant in the court below.

That was a suit for the recovery of the value of cotton lost by fire. The owner had no contract with the railway company, but he had deposited his cotton with the compress company at Little Rock, where it was destroyed

> "The defendant railway company had made an an oral agreement with the compress company to receive and transport all cotton in bales brought by its owners to the shed of the compress company, and broke this agreement by neglecting to furnish transportation for most of the cotton delivered by its owners to the compress company and for which the railway had issued bills of lading, but it had issued none for the 340 bales involved in the suit. By

reason of the neglect of the railway company to furnish transportation and the consequent accumulation of cotton in the sheds of the compress company, a large number of bales (including the 340 bales, the subject of this suit) were piled and kept by the company in public streets adjacent to its sheds, and while there was destroyed by fire from an unknown cause. So far as concerned the 340 bales the only contract of the railway company was with the compress company that it was to receive and transport the cotton. The negligence of the railway company to furnish sufficient transportation may have been a breach of that contract, for which the compress company might maintain an action, but it created no liability in contract or in tort to the owner or insurers of the cotton or to any other person. This cotton certainly was in the exclusive possession and control of the compress company. The railway company had not assumed the liability of a common carrier or even a warehouseman with regard to it; *had given no bill of lading for it; had no custody or control of it, and no possession of it, either actual or constructive,* and had no hand in placing or *keeping* it where it was. The delay of the defendant railway company to furnish transportation according to its contract with the compress company was in no legal sense a cause of the destruction of the cotton. It was simply one of a series of antecedent events without which the loss could not have happened, for, if the cotton had not been there, it would not have been burned. The cause of the loss was the fire, kindled by some unknown means, and in no way arising from or connected with the neglect of the defendant to furnish transportation. Upon principle and authority that neglect was not

> the direct and proximate cause of the loss by fire, and did not make the defendant responsible for that loss to the owners of the cotton or to their insurers."

The court, in considering what effect the issuance of the bill of lading by the railway company for cotton forming part of the same mass accumulated in the streets had upon the railway company's liability, said:

> "The evidence warranted, if it did not require, the inference that the bills of lading were issued merely for the convenience of all parties and with no intention of making any change in the actual or legal custody of the cotton until it was so loaded."

In the case at bar the defendant sought to be brought in line with the above decision by making the allegation that the bill of lading was issued to W. A. Arthur & Co., for their accommodation, but this allegation is not sustained by evidence. The bill of lading shows that the railway company reserved the right to compress the cotton, and the compression might have been done by the railway company at this compress or any other that it might have selected. Defendant might have compressed it at its own compress if it owned one. This was a privilege given to the defendant and there is no evidence that it was the purpose of the parties to the contract that whatever compress might be selected by the railway company should become the agent of W. A. Arthur & Co., instead of agent of the defendant.

Now the above decision of Railway Co. *vs.* Commercial Ins. Co., turned upon the point that the failure of the

railway company to furnish transportation was not the proximate cause of the loss of the 340 bales of cotton for which no bill of lading had been issued. No one claimed that the railway company was in possession of the 340 bales of cotton. The only claim made was that because the railway company had issued bills of lading for a lot of cotton piled in a street, which was destroyed by the same fire that spread to and consumed the cotton belonging to the plaintiff, the railway should be held responsible on the theory that the failure of the railway company to promptly remove the cotton for which it had issued bills of lading was the direct cause of the fire.

In the case of Martin *vs.* Railway Co., 55 Ark. 510, it appears that the plaintiff lost a building and 1,600 bales of cotton by spreading of the fire which destroyed the Union Compress, at Little Rock. Plaintiff's building and cotton were near the mass of cotton in the possession of the compress company, for a part of which the railway company had issued bills of lading, but it had issued no bills of lading to the plaintiff for any part of his cotton. The Arkansas Supreme Court held that the mere failure of the railway company to perform its contract with the compress company by a prompt removal of the cotton for which it had given bills of lading was in no wise the juridicial cause of the fire. There was no direct connection between the negligence of the defendant to furnish transportation according to its contract and the fire. The failure to furnish cars was one of a series of incidental events without which, as the result proved, the fire probably would not have happened, for

if the cotton had been removed there might have been no fire. But it was not the direct and proximate cause and did not make the defendant responsible for losses caused by fire.

There is no similarity in those cases to the case at bar either in the facts or in the relation of the plaintiffs to the railway company. In those cases the plaintiffs had no contract or bill of lading from the railway company, while in this case Arthur & Co., had the bill of lading for the shipment of their cotton and was under no contract with the compress company.

The Union Compress Co., of Little Rock (which also owned the compress at Texarkana in which plaintiff's cotton was lost) was destroyed by fire on the 14th of November, 1887, out of which arose the cases mentioned of St. L., I. M. & S. Ry. Co. *v.* Commercial Insurance Co., and Martin *v.* Railway Co.

A case more interesting because applicable to the case at bar is that of Cal. Ins. Co. *v.* Union Compress Co., 133 U. S., 387, which also arose out of the fire above mentioned. The facts in that case show that the Missouri Pacific Ry. Co., and the Memphis & Little Rock Ry. Co., issued bills of lading containing the fire exemption clause to different owners for their cotton stored with the Union Compress Co., and that the compress company insured the cotton for the benefit of said railway companies, and the railway companies gave orders for the compression of the cotton and at the time the fire occurred which destroyed the cotton there was an accumulation of cotton at the sheds of the compress owing to the

fact that the Missouri Pacific Railway Co., had failed to furnish cars to transport the cotton to Argenta for compression as fast as it was received; that the cotton sheds were open sheds full of cotton, which had no tarpaulin or other covering over it and stood within a few feet of the track of the Missouri Pacific Ry. Co., over which locomotives and trains passed several times a day; that after the sheds were full, the cotton was stored in the street leaving a passageway some four feet wide for foot passeng rs; that the two railroad companies had no control over the cotton while so stored and could not obtain actual possession of it until the Missouri Pacific Ry. Co., transported it to Argenta for compression, but that company could take it any time across the river for compression. It does not appear that the fire caught from sparks of locomotives and the act of negligence of the railroad is that the cotton was uncovered and not protected against fires.

The compress company brought suit against the insurance company for the benefit of the railway companies, and showed that since the loss by fire the St. L., I. M. & S. R'y Co., had been sued in the United States Circuit Court for the Eastern District of Arkansas by York Mfg. Co. and Hazard & Chapman, and said railway company defended the action on the ground that said loss was not occasioned by the railway company or its servants and employees, and on the trial of the first-named case it was adjudged by the court that the York Mfg. Co. recover from said railway company the value of the cotton sued for, and the railway company had paid said judgment,

and that several suits were then pending against the Little Rock & Memphis R'y Co., brought by consignees for portions of said cotton for the loss thereof by reason of the negligence of said railroad company.

Plaintiff recovered, and the Supreme Court of the United States, on appeal, affirmed the judgment of the lower court against the insurance company. In the bills of lading issued by the railway company, a clause exempting the company from loss by fire appeared, but there was a finding that the railway companies were liable to the holders of the bills of lading, because of the negligent failure of the railway companies or their agent, the compress company, which had actual possession of the cotton, to take care of and guard the cotton against loss by fire. There seems to have been no direct act on the part of the railway company contributing toward the loss of the cotton. The railway company had merely issued bills of lading, and one of them had agreed to transport the cotton to Argenta to be compressed. There was a breach of contract between one of the railway companies and the compress company to remove the cotton fast enough to prevent too great accumulation, but neither of the railway companies nor its employees was negligent further than to allow the cotton to remain where it was in the custody of the compress company without any covering and without being properly guarded.

The railroad company was not itself in physical possession, but the compress company in that case, as in this, was the agent of the railway company and held for it. There seems to have been no denial by the railroad com-

pany in that case that there had been a complete delivery to the railroad company when it accepted the receipts for the cotton, issued bills of laden therefor, accepted the insurance and issued orders for its compression. But if there had been the language of the Court on this point is too clear and emphatic to be misunderstood.

The Court on page 410 said:

> "The original depositors of the cotton surrendered to the railroad companies the receipts which they had taken from the plaintiff, and those companies were thus substituted in the relation to the plaintiff which before had been held by such depositors."

These facts are practically identical with the case at bar, and the decision sustains the propositions contended for by plaintiffs in error that there was a delivery of the cotton, the liability of the carrier had attached at the time of the fire, and the railway company was liable for the negligence of the compress company.

## Negligence.

The courts uniformly hold that a limitation against liability is not operative where the loss occurred by reason of negligence.

Railroad Co. v. Lockwood, 17 Wallace, 383.

Bank of Ky. v. Adams Express Co., 93 U. S., 174.

Inman v. Railway Co., 129 U. S., 128.

There is evidence showing two distinct grounds of negligence causing the loss of plaintiff's cotton, both of which are chargeable to the defendant.

1. The defendant was negligent in detaining and storing the cotton with the compress company on its platforms, a place known to the defendants to be unsafe, the cotton was kept unprotected against fire.

2. The compress company was the agent of the defendant, charged with the protection of the cotton, for whose negligence the defendant was liable, and it negligently left the cotton exposed, and failed to take the ordinary precautions to guard or watch it, and did not use the means in its power to prevent its loss. The compress company provided no protection against fire, and defendant knowing this, is liable for the loss of plaintiff's cotton.

The Union Compress Company's platforms were the only place provided by the defendant to receive cotton for shipment, and it is shown that the platforms were not a safe place on which to store cotton. They were open and unprotected, while there were railroads on three sides where engines were constantly passing which had set the premises on fire frequently before. There were no adequate means provided for fighting fire, only two fire plugs having been placed there, and these were on the west side, 140 feet apart, except a small hydrant near the press for drinking purposes. There was no covering at all provided for the cotton, and none for the platforms except a small shed near the center, covering about one-fourth of the platforms, and it was not enclosed. The number of bales on the platforms at the time of the fire was about 1,300, and there was no watchman.

Mr. Buron, the agent of the railway company, who was

attending to the cotton business for the railway company, stated that he made frequent trips down to the platforms, and he must have known the conditions that existed. It cannot be contended, I think, that the plaintiffs ought not to have placed their cotton on the platform. There seems to be no reason why plaintiffs might not take the risk themselves of the loss of their own cotton while they kept it on the platform for concentration and classification. It was a matter of their own concern. But did not that risk shift to the railway company when it accepted the cotton at that point and insured it? The plaintiffs kept the cotton insured while in their possession and if the railway company had not expected to be chargeable with the risk, it ought not to have received it at the place. If the plaintiffs had concentrated and classified their cotton at another point they would have been compelled to take it to the platforms where the railway company received cotton for shipment in order to have it shipped. The fact that plaintiffs had placed their cotton upon the platforms and kept it there until they got ready to ship is immaterial, because the railway company would have required it to be carried there anyway before they would have issued bills of lading.

In the case of Judd *v.* New York & T. S. S. Co., 117 Fed. Rep., 206, it appears that a steamship company received from a connecting carrier a consignment of wool, which it placed in its shed adjoining the dock to await shipment, and while there the shed and its contents were destroyed by fire, which originated in an adjoining shed owned by others. Both sheds were wood and very dry,

and the one in which the fire originated contained a large quantity of jute, which was very inflamable, and particularly exposed to danger from fire. In an action by the owner to recover the value of the wool, there was evidence tending to show that the company had knowledge of the condition of the adjoining shed, and that it had no watchman, and little, if any, fire protection; also that while defendant employed a watchman its shed was not as well constructed to withstand a fire from the outside as others along the docks, and that there were no fire hydrants within easy reach, as there were in the case of other sheds. Held, that upon such evidence the question whether defendant exercised due care for the protection of plaintiff's goods, was one upon which reasonable men might fairly differ, and which it was the province of the jury to determine.

The fact that a carrier which placed goods received for shipment in its warehouse took adequate precautions against fire on its own premises does not exonerate it from liability as a matter of law for the destruction of the goods from a fire originating on adjoining premises which it did not own nor control, although such fire was so violent that it was impossible to prevent it from spreading to its own building, where it had full knowledge of the manifest danger to its own premises arising from the specially hazardous condition of those adjoining, and took no means to guard against it. Under such circumstances, it may have been culpable negligence, and a breach of duty as a bailee for hire, to place the goods in such warehouse.

In the case of Railway *v.* Dodd, 59 Ark., 317, it appears that the goods destroyed by fire had reached their destination and were stored by the railway company and that its liability was that of a warehouseman. The Court, in deciding whether it used ordinary care and diligence in the preservation of the property, said:

> "What constitutes such care and diligence is a question which depends for its answer upon the peculiar circumstances of each case, such as the nature and value of the property; its exposure to damage and loss; its proximity to danger from fire; the means employed to prevent or arrest the progress of the fire; the location, character and construction of the storehouse in which it was placed."

The Court further held that there was evidence of negligence from the fact that the cotton was a highly inflamable material at a time when the weather was very dry and was near a railway company's track on which trains were passing daily.

In the case at bar it appeared from the evidence that there was no watch kept of the cotton; that trains were constantly passing on three sides of the platform on which was located about 1,300 bales of cotton unprotected by shed or any covering, and that there was not sufficient apparatus provided for fighting fire.

In case of Railway *v.* Fire Association, 55 Ark., 177, the Court, in passing upon the question as to whether a shipper was guilty of contributory negligence in placing cotton upon a platform where it was liable to be destroyed by fire at which the railway company received shipments of cotton, said:

"The fact that the cotton in question was placed on a platform where it was exposed to danger did not cause the owner to forfeit the protection of the law. The cotton was placed on a platform constructed near the track of the railroad for the purpose of receiving freight for shipment and where the railroad company had been receiving cotton. The owner had the right to place it there, and in doing so did not lose its right to compensation for its destruction or damage occasioned by the negligence of the appellant."

There are many authorities cited in sustaining this opinion. The court further said:

"The rule releasing the defendant from liability on account of the contributory negligence of the plaintiff is limited to cases where the negligent act or omission of the plaintiff contributes to produce the loss as a proximate cause, and not as a remote cause or mere condition. In order to avail the defendant anything there must be, not only negligence on the part of the plaintiff, but contributory negligence, a real proximate casual connection between the plaintiff's negligent act and the injury, or it is no defense to the action. There can be no reason in relieving the defendant from liability for the loss on account of the negligence of plaintiff, if the negligent act of the plaintiff in nowise directly contributed to produce the injury. 'I may negligently leave my goods in a warehouse,' says Mr. Wharton, 'but this is not the juridical cause of their destruction if such destruction comes, not as a natural and usual result of my negligence, but through the negligence of another who sets fire to the warehouse.

> In other words, my remote negligence will not protect a person who, by proximate negligence, does me an injury.'"

On the question of negligence which should be submitted to a jury, the Supreme Court of the United States sustained the following instruction of Judge Henry C. Caldwell in case of Cal. Ins. Co. *v.* Union Compress Co., 133 U. S., 387:

> "Now, you have heard the testimony, gentlemen, with reference to the situation under which this cotton was placed and the length of time it remained there. If you think there is no negligence on the part of the railroad company, then you will find that the railroad company is not liable for this cotton. If you can say that that was a proper place to store cotton, and that leaving a passageway there of not exceeding four feet up and down, through which persons passed at all hours of the day and night to the boat house and skiff ferry, and it being a dry season, with three or four thousand bales of cotton stored there—then, if you say this is not negligence, you excuse this railroad company, and to that extent will disallow the claim of the plaintiff; but if you should so find I would be very much surprised at your verdict, and would not be surprised if I should set it aside; but I will leave it for you to say."

In the case of Marine Ins. Co. *v.* S. L., I. M. & S. Ry., 41 Fed. Rep., 643, which also grew out of the destruction of the Union Compress at Little Rock, Ark., and all cotton stored therein and adjacent thereto, it was shown that the railway company made the cotton sheds one of

its stations for receiving cotton for shipment, and it was claimed by the railway company that if it was negligence on the part of the railway company to receive and store cotton at that place that the owners of the cotton were guilty of contributory negligence. Judge Caldwell, in a vigorous opinion, said :

> "The plea of contributory negligence is not sustained. The delivery of the cotton at the sheds by the insured was in no sense the proximate cause of the loss, and no act of negligence on the part of the plaintiff that is not a proximate cause of the injury complained of can be considered in the light of contributory negligence, such as will bar a right of action. Beach, Contrib. Neg., Par. 10. Moreover, the defendant gave bills of lading for all cotton that was offered to it for shipment, down to the very day of the fire ; and it cannot now be heard to say that it was the fault of any one to trust it to perform its duty, because it had shown itself to be untrustworthy in the past. Immunity from liability is not to be secured by a train of misconduct, however long continued.
>
> "A few cases illustrative of this principle may be mentioned. A tenant rented certain lands for 1877, knowing that a railroad company maintained a nuisance thereon in the shape of a pond of water, which affected the health of his family. With this knowledge he rented the place for the year 1878, when it became more sickly, so much so that he was unable to gather his crops ; and he brought an action against the railroad company ; and it was held that tenant could presume that the latter would abate the nuisance ; that the law did not re-

quire him to remove, but did require the company to abate the nuisance. Railroad Co. *v.* English, 73 Ga., 366. The law will not hold it imprudent in a person to act upon the presumption that another will act in accordance with the rights and duties of both, even though he may have formerly conducted himself in a contrary manner. Newson *v.* Railroad, Co., 29 N. Y., 383. The subject is discussed in Kellogg *v.* Railroad Co., 26 Wis., 223; Fraler *v.* Water Co., 12 Cal, 555; Bowas *v.* Towline, 2 Sawy., 27. See, also, Beach, Contrib. Neg., Pars. 10, 13, 18, 23; Damour *v.* Lyons City, 44 Iowa, 276. Moreover, if it were held to be negligence on the part of the insured and other to deposit their cotton in the sheds, knowing that the defendant had failed to remove other cotton promptly, as its duty required, still if the defendant, its officers and agents, knew of the negligence of the persons thus depositing their cotton, as the evidence shows that they did, it was their duty to avert the consequence of their negligent acts, and the defendant could not evade responsibility for a failure to do so: Railroad Co. *v.* Freeman, 36 Ark., 46."

2. In addition to the fact that the compress platforms were unsafe for the storage of cotton, the employees of the compress company did not use the means in their power to prevent its destruction.

The manager of the company had gone to dinner; the bookkeeper, the only other white man on the premises, was in the office asleep and the five employees were near the press eating dinner. A locomotive drawing a heavy train of cars passed along the south side and a switch engine on the west side, and in 20 or

30 minutes the fire was discovered at the southwest corner. After these engines passed no examination was made by any employee to see whether sparks had fallen on the exposed cotton, and it appeared that this duty had not been imposed on any one. When the employees discovered the cotton on fire, they attempted to throw water on it from the hose attached to a hydrant near the southwest corner, but the nozzle belonging to the hose was missing and their efforts were ineffectual After some time the nozzle was found in another part of the premises, but when it was attached to the hose, it was too late to check the fire.

The question whether these acts on the part of the compress company and its employees constituted negligence which contributed to the loss of the cotton should have been left to the jury, since the compress company was the agent of the railway company in custody of the cotton. I believe the authorities clearly sustain the proposition that the railway company is liable for the negligence of the compress company and its employees.

Bank of K'y *v.* Adams Express Co., 93 U. S. 174.

Block *v.* Merchants' Dispatch T. Co. (Tenn.), S. W. 6, p. 881.

Boscowitz *v.* Express Co., 34 Am. Rep., 197; 93 Ill., 523.

Christenson *v.* Express Co., 15 Minn., 270 (Gil., 208).

Transportation Co. *v.* Oil Co., 63 Pa. St., 14.

The opinion in the case of Bank of Kentucky *v.* Adams

Express Co., is remarkable for its strength and clearness, and its argument seems to be unanswerable.

In that case the express company undertook to carry a package of money from New Orleans to Louisville, and the bill of lading provided—

> "That the express company is not to be liable in any manner or to any extent for any loss or damage, or detention of such package or its contents, or any portion thereof, by fire."

While the train to which the car containing the package was attached was passing over a trestle on the line of the Louisville & Nashville Railroad, and while the package was in charge of the messenger of the defendant, the trestle of the railway company gave way during the night. The train, with the express car, was thrown from the track and the car, with others, caught fire from the locomotive and was burned, together with said package of money. There was some evidence that some of the timber of the trestle seemed decayed.

It was contended by the express company that it was guilty of no negligence, and that the exemption in the bill of lading exempted it from liability; that although the railway company may have been guilty of negligence in failing to provide a sound trestle, that the defendant was not responsible because it had no control over the railway company or its employees.

The lower court in this case instructed the jury that the express company was not liable for the negligence of the railway company, for it appeared that the express

company used reasonable diligence in selecting the railway company as a vehicle for carrying out its contract of shipment.

But the Supreme Court of the United States reversed that decision holding that the railway company was the agent of the express company, and that the fire exemption did not excuse the express company for the negligence of the employees of the railway company. The court said:

> "The railroad company in transporting the messenger of the defendant and the express matter in his charge was the agent of somebody; either of the express company or the shippers or consignees of the property; that it was the agent of the defendant is quite clear. It was employed by them and paid by them. The service it was called upon to perform was a service of the defendant; a duty incumbent upon them, and not upon the plaintiffs. The latter had nothing to do with the employment. It was neither directed by them, nor had had they any control over the railroad company or its employees. It is true that the defendant had also no control over the company or its servants, but they were its employers and that service was directly and immediately for them. Control of the conduct of the agency is not in all cases essential to liability for the consequences of that conduct. If anyone is to be affected by the acts or omissions of persons employed to do a particular service surely it must be he who gave the employment. These acts became his because done in his service and by his direction. Moreover, a common carrier who undertakes for him constitute another person or corporation the agent

self to perform an entire service has no authority to of his consignor or consignee. He may employ subordinate agency; but it must be subordinate to him, but not to one who employs it or pays it, nor has any right to interfere with it.

"If, then, the Louisville & Nashville Railroad Company was acting for these defendants and performing a service for them, when transporting the packages they had undertaken to convey, as we think must be concluded, it would seem it must be considered their agent. And why is not the reason of the rule, that common carriers cannot stipulate for exemption from liability for their own negligence and that of their servants and agents, as applicable to the contract made in these cases as it was to the facts that appeared in the case of R. R. Co. *v.* Lockwood? The foundation of the rule is, that it tends to the greater security of consignors, who always deal with such carriers at a disadvantage. It tends to induce greater care and watchfulness in those to whom an owner intrusts his goods, and by whom alone the needful care can be exercised. Any contract that withdraws a motive for such care, or that makes a failure to bestow upon the duty assumed extreme vigilance and caution more probable, takes away the security of the consignors, and makes common carriage more unreliable. This is equally true, whether the contract be for exemption from liability for agencies employed by the carrier to assist him in the discharge of his obligations, though he has no control over them, or whether it be for exemption from liability for a loss occasioned by the carelessness of his immediate servant. Even in the latter case he may have no actual control. Theoretically, he has; but, most frequently, when the negligence

of his servant occurs, he is not at hand, has no opportunity to give directions, and the negligent act is against his will. He is responsible, because he has put the servant in a place where the wrong could be done. It is quite as important to the consignor and to the public, that the subordinate agency, though not a servant under immediate control, should be held to the strictest care, as it is that the carrier himself and the servants under his orders should be.

"For these reasons, we think it is not admissible to construe the exception in the defendants' bill of lading as excusing them from liability for the loss of the package by fire, if caused by the negligence of the railroad company to which they confided a part of the duty they had assumed."

In the case of Lancaster Milis *v.* Merchants' Cotton Compress & Storage Co. (Tenn.) 14 S. W., 317, the court held that where a bill of lading was issued for cotton giving the railway company the privilege of compressing it at its own expense for convenience of carriage and exempting it from loss by fire, and it appearing that the cotton was destroyed in the compress while in the hands of the compress company for compression, the compress company was the agent of the railway company, and that the railway company would be liable for the value of the cotton if it was destroyed by the negligence of the compress company, and that the stipulation against loss by fire was valid only in the event that the cotton was not destroyed by negligence of the compress company. The result of that case was that the railway company was held

not liable because of the proof that the compress company was not guilty of negligence.

The principle contended for is ably sustained by the opinion in the case of Block *v.* Merchants Dispatch T. Co. (Tenn.), 6 S. W., 881, both by reasoning and by au-authority and attention is specially directed to that opinion.

But a case which appears to be still more convincing that the plaintiffs in error should be entitled to recover in this suit is that of Cal. Ins. Co. *v.* Union Compress Co., 133 U. S., 397, which has already been commented upon at length.

In that case, where the facts are almost identical, it appears that the court held the negligence of the compress company, in whose care the cotton was placed, in failing to take care of the cotton stored, was the negligence of the railway company which had issued bills of lading for the cotton destroyed, and we rely with confidence upon that authority.

The defendant in the lower court pressed the point set up in the answer that it had no control over the employees of the compress company.

This question seems to be foreclosed by the opinion in the great case of N. Y. C. R. R. Co. *v.* Lockwood, 17 Wallace, 357. Judge Bradley said:

> "But it is contended that though a carrier may not stipulate for its own negligence, there is no good reason why he should not be permitted to stipulate for immunity for the negligence of his servants, over whose actions, in his absence, he has no *control*."

After presenting the arguments why such contention was not sound, the court further said :

> "It is obvious, therefore, that if a carrier stipulated not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the essential duties of his employment. Now to what avail does the law attach to these essential duties to the employment of the common carrier if they may be waived in respect to its *agents* and servant, especially when the carrier is an artificial being incapable to act except by *agent* and servants?"

**The Fire Exemption in Bill of Lading was Void for Duress.**

It was proven in this case that the defendant had three forms of bills of lading for shipment of cotton, substantially the same except the name given to them in headings. One was for domestic shipments within the State of Texas, another for shipments from Texas to points outside of the State within the United States, called an interstate bill of lading, and the other for shipments to foreign ports called export bill of lading (R., 10, 33, 35).

Each of these bills of lading exempted the defendant from liability for loss of the cotton by fire. There was no other form of bill of lading provided by the company for the shipment of cotton, and the agent of the company had no authority to change the form or to accept cotton for shipment except on one or the other of these forms.

The testimony of plaintiffs showed also that they had called for the different freight rates each season, and that

the rate charged in this case was the regular and only rate for the shipment of cotton, and that they had never heard of any other.

Their testimony further showed that they had made repeated efforts to induce the agents of the company at different places along their line in Texas to give bills of lading without the fire exemption.

This evidence leaves it clear that no option was given or afforded plaintiffs for the shipment of their cotton except on the terms prescribed by the bill of lading. Here was a plain coercion on the part of the defendant requiring the plaintiffs to accept this form of bill of lading or none at all. There was an effort on the part of the defendant to prove that they had another higher rate by which they would have shipped the cotton without limiting their liability, but it is shown that no shipment had ever been made of cotton in bales by that rate, that no shipper knew anything about it, and that the agents themselves knew nothing of it, and there was no one authorized to issue such a bill of lading except by direct authority first obtained from the general officers at Dallas, Texas.

It was not necessary to go into the question as to whether this rate was reasonable or not because it was not a rate which was offered to the shippers.

In the case of York Mfg. Co., *v.* Ill. Central Ry. Co., 3 Wallace, 107, Mr. Justice Field said:

> "He (the carrier) is chargeable for all losses except such as may be occasioned by the act of God or the public enemy. He insures against all accidents

which result from human agency although without any fault or neglect on his part, and he cannot, by mere act of his own, avoid the responsibility which the law thus imposes. He cannot screen himself from liability by any general or special notice, nor can he coerce the owner to yield assent to a limitation of responsibility by making exorbitant charges when such assent is refused."

In the case of Railway Co., *v.* Cravens, 57 Ark., 112, it was distinctly held that:

"A carrier cannot by special contract limit its common-law liability for losses not occasioned by its negligence where it does not afford the shipper an opportunity to contract for the service required without such restriction; and it is immaterial that the shipper knowingly accepted a bill of lading containing such restriction, without demanding a different contract, if he knew that the carrier's agents had no authority to make any other contract with him."

This doctrine was re-affirmed in Railway Co., *v.* Spann, 57 Ark., 127.

In the case of Louisville & N. R. Co. *v.* Gilbert (Tenn)., 12 S. W. 1018, the court, speaking through Caldwell, J., held:

"A railroad company that has made no reduction in its freight in consideration of a stipulation in a bill of lading exempting it from loss by fire; that has furnished its agent with no form for a bill of lading not containing the 'fire clause'; and that has given him no authority to submit to the shipper the alternative of paying a higher rate for a shipment with the common law responsibility attaching to

the company—is liable for goods destroyed by fire, though the company's officers testified that the company had two freight rates—one under the restricted liability, the other without—and that, if the shipper had so requested, permission would have been given to ship under a contract without the 'fire clause' in it.

"Where the railroad ccompany has given its customers no choice as to whether they would ship with or without the 'fire clause,' the acquiescense of the shipping public in the form of the bill of lading containing the 'fire clause' does not establish the reasonableness of the exemption."

The freight agent in that case testified that if he had been informed that the plaintiff refused to ship his cotton under this bill of lading, then he would have instructed the agent of the company to ship it by the regular rates, which would have been done by telegraph, and that the bill of lading in evidence in that case had always been acceptable to the public.

In the opinion just quoted the court thought there could have been no stronger evidence of duress, and the facts are almost identical with the case at bar.

One of the plaintiffs in that case testified that he had been a shipper over the L. & N. Railway Co. many years and that the Merchants' Exchange at Nashville protested against the introduction of the fire clause in defendant's form of bill of lading and gave the company notice of the protest. The court further said:

"What stronger proof could there be that the company did not, was not ready, and did not pretend to

do business except upon the most restricted liability, than that the agent had no authority to make any contract but the one that he did make and was furnished with no other form of bill of lading?"

The case at bar is stronger than the one referred to, because W. A. Arthur, one of the plaintiffs, testified that he had at different times applied to the agents of the defendant company for bills of lading without the fire clause and that he was informed that they would issue no other kind.

In the case of N. Y. Central Ry. *v.* Lockwood, 16 Wallace, 357, the court said:

"It is a favorite argument in the cases which favor the extension of the carrier's right to contract for exemption from liability, that men may be permitted to make their own agreements and that it is no concern of the public on what terms an individual chooses to have his goods carried.

"Is it true that the public interest is not affected by individual contracts of the kind referred to? Is not the whole business community affected by holding such contracts valid? If held valid, the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers in effect, by introducing new rules of obligation.

"The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle or stand out and seek redress in the courts. His business will not admit of such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing

what the one or the other contains. In most cases, he has no alternative but to do this, or abandon his business. In the present case, for example, the freight agent of the company testified that though they made forty or fifty contracts every week like that under consideration, and had carried on the business for years, no other arrangement than this was ever made with any drover. And the reason is obvious enough—if they did not accept this, they must pay tariff rates. These rates were 70 cents a hundred pounds for carrying him from Buffalo to to Albany, and each horned animal was rated at 2,000 pounds, making a charge of $14 for every animal carried, instead of the usual charge of $70 for a car load; being a difference of three to one. Of course no drover could afford to pay such tariff rates. This fact is *advertes* to for the purpose of illustrating how completely in the power of the railroad companies parties are, and how necessary it is to stand firmly by those principles of law by which the public interests are protected."

The above opinion is a bar to any false pretense or scheme adopted by a carrier to coerce shippers into agreeing to limitations of liability.

If the limitation in the case at bar is to be recognized and approved, then the doctrine that a common carrier must accept goods for shipment without limitation of its liability is a dead letter.

It was certainly unnecessary for the plaintiffs in every shipment to demand that the railway company eliminate the fire clause. It is clearly shown that it was useless to make said demand at any time. The testimony of Hovey, the agent of the company, was that he had no

authority to make any change or to make any other contract. The law then certainly would not have required the plaintiffs to do the foolish thing of demanding what they already knew and what the railway company knew it would not have granted.

There are numerous cases which I believe sustain the plaintiffs' contention.

Nashville, C. & St. L. Ry. Co. *v.* Stone & Haslett (Tenn.), 79 S. W., 1031.

Mo., K. & T. Ry. Co. *v.* Carter (Tex.), 29 S. W., 565.

Texas & Pacific Ry. *v.* Avery (Tex.), 46 S. W., 897.

L. & N. R. R. Co. *v.* Gilbert (Tenn.), 12 S. W., 1018.

Gulf, C. & S. F. Ry. Co. *v.* Wilson (Tex.), 26 S. W., 131.

Gulf, C. & S. F. Ry. Co. *v.* Wilbanks (Tex.), 27 S. W., 302.

Ill. Cent. Ry. *v.* Craig (Tenn.), 52 S. W., 164.

Ward *v.* Mo. Pac. Ry. (Mo.), 58 S. W., 28.

In the last case cited it was held that where a consignee of goods shipped from another State sues a carrier for the value of the goods lost in transit, his right to recover their value cannot be limited by the contract of shipment which expressed a consideration of reduced freight rates, since the contract violates the inter-state commerce act, section 2, forbidding special rates.

The bill of lading executed by the defendant purports to have been given "In consideration of the rate of freight herein named, etc."

Inasmuch as the proof tends to show that the freight rate charged was the regular published rate, there was no

consideration for the restricted liability, and therefore it is not valid.

San Antonio, etc., Ry. *v.* Barnet (Tex.), 34 S. W., 139.
Kellerman *v.* K. C., etc. Ry. (Tex.), 34 S. W., 41.

> "It is also settled that where no choice is shown to have been offered the shipper, he in reality was allowed no option or selection as to the kind of contract under which he could ship his goods; nor was he offered any differences in rates. The contract limiting his liability was a mere form, was without consideration, and could not be relied on."
> Duveneck *v.* Mo. Pac. R. R., 57 Mo. App., 550.

Now if the fire had occurred while the cotton was in the hands of a connecting carrier without notice of the imposition there is sufficient reason why the limitation might have been successfully pleaded. But this cotton was destroyed in the hands of the initial carrier, the defendant, which perpetrated the wrong upon the plaintiffs in compelling them to accept this form of bill of lading.

The defendant held itself out to the cotton shipping public as a common carrier from Texarkana to Utica and it is now estopped from making a contrary claim.

Block *v.* Merchants' Dispatch T. Co., 6 S. W., 881.
Texas & Pacific Ry. *v.* Avery (Tex.), 46 S. W., 897.
Gulf, C. & S. F. Ry. *v.* Wilson (Tex.), 26 S. W., 131.
Gulf, C. & S. F. Ry. *v.* Wilbanks (Tex.), 27 S. W., 302.

The freight charged the plaintiffs from Texarkana to St. Louis was 60 cents per hundred pounds and to this they added the regular freight rates from St. Louis to

Utica, a much greater distance, 25 cents per hundred pounds. It developed in the evidence that the defendant expected to ship this cotton by way of the St. Louis, Iron Mountain & Southern Ry. Co., from Texarkana to St. Louis, and although the latter company was to carry the cotton the entire distance the defendant was to receive $1.50 per bale.

The defendant, as shown, refused to allow the plaintiffs to have anything to do with routing the cotton and they might have shipped it by some other connecting line, by way of New Orleans, Galveston, Dallas, Ft. Worth, or other Texas cities.

The defendant contended that it was to ship the cotton only from the compress to the state line and connect with the St. Louis, Iron Mountain & Southern Ry. Co., a distance of a few hundred yards, and that because this was an inter-state shipment it had a right to incorporate any limitations in the bill of lading that it saw fit. But this is not true so long as it held itself out as a common carrier from Texarkana to Utica, and especially since it appears that plaintiffs would not have been given a bill of lading for the shipment of cotton to the end of defendant's own line without incorporating the fire clause.

The learned counsel for defendant in error in the court below relied upon the authority of the cases of Cau *v.* Texas & Pacific Ry. Co., 113 Fed. Rep., 91, and Charnock *v.* Texas & Pacific Ry. Co., 113 Fed. Rep., 92, both of which cases have recently been affirmed by the Supreme Court of the United States.

But the facts in these cases were quite different from

the facts in the case at bar. From the opinions in said cases the court found:

"No negligence is charged against the carrier. The shipment was made by the plaintiff's agent, an intelligent and experienced buyer and shipper of cotton. He is presumed to have known the law, and to have been aware that the carrier, if he so desired, *was compelled to take the freight under its common-law liability, without the fire clause.* Furthermore, it was proven that prior to the shipment plaintiff's agent called for blank bills of lading, took them to his office, and in his own time, filled them and then presented them for signature by the carrier. This fact, together with the general knowledge which the plaintiff's agent must have had from his previous experience in shipping cotton, makes it certain that as a matter of fact the plaintiff's agent *knew of and assented* to the fire clause. Shippers have been held bound by the fire clause in a bill of lading, even when they claimed that they did not know that the clause was in the bill of lading, provided they were afforded a full and fair opportunity to acquaint themselves with the contents of the bill of lading. Failure to read the bill of lading has been held, under such circumstances, not to avail the shipper. But, of course, the present cause is one in which, as matter of fact, the shipper knew, or must be held to have known, that the bill of lading contained the fire clause. I am clear that there is nothing in the evidence which would invalidate the bill of lading for duress, concealment, fraud or misrepresentation by the carrier."

In the case at bar it has been shown that the plaintiffs

had frequently demanded that the bill of lading for the shipment of cotton be changed so as to leave out the fire clause, which had been refused, and plaintiffs knew that it would be useless to make the demand as each shipment was made. The agents of the railway company testified that they had no authority to change the form of the bills of lading; that no other form was provided by the general agents and that no change could have been made under any circumstances without first getting the authority from the general freight offices at Dallas.

Thus it appears that no alternative was left to the plaintiffs in error but to accept the form prepared. There was no bona fide option of selection afforded by the defendant to cotton shippers. In other words, the carrier had placed itself in a position that no bill of lading could be issued without making a new rule at its general offices.

So long as we are assured by all the authorities that a common carrier is compelled to accept goods as an insurer, a shipper is certainly not required to go to the headquarters of a railway company to beg for rights which are denied by regular agents.

No information was ever furnished that these acts of the local agents, in following their instructions, would have been reversed by the same power that authorized them, until this case had reached an acute stage in a court of justice.

**The Fire Clause in Bill of Lading if Valid Was Not in Force While Cotton Was Detained For Compression.**

In the case at bar it will be noticed that the fire clause is in general terms, and we respectfully insist that it ought not to extend to the loss of the cotton while the carriage thereof was suspended by the carrier for compression. The railway company evidently did not consider it was to be released from the loss of the cotton by fire while it was with the compress company, because it had it insured while on the compress platforms, but not while in transit.

Restriction upon the liability of a common carrier in the bill of lading for the carrier's benefit and in language chosen by himself must be narrowly construed.

"Queen of the Pacific," 180 U. S., 52.

T. & P. Ry. Co. *v.* Reiss, 183 U. S., 626.

The bill of lading does not exempt the defendant from loss by fire while the cotton is in charge of the compress company. It does, however, give to the *defendant* the right to compress the cotton, but the compression of the cotton under this clause would be the act of the defendant. It did not authorize the defendant to have the cotton compressed by some person or company as agent for the plaintiffs. The compression of the cotton was to be performed by the defendant, and when it selected the compress company to perform that act that company became the agent or employee of the railway company.

In the case of the Texas & Pacific Ry. Co. *v.* Reiss, 183, U. S., 621, Mr. Justice Peckham defines the rule in regard to construing a bill of lading most strongly against the carrier as follows:

> "The bill of lading itself is an elaborate document, bearing on its face evidences of care and deliberation in the formation of the condition of the liability of the companies issuing it. The language is chosen by the companies for the purpose, among others, of limiting and diminishing their common law liabilities, and if there be any doubt arising from the language used as to its proper meaning or construction, the words should be construed most strongly against the companies, because their officers or agents prepared the instrument, and as the court is to interpret such language, it is, as stated by Mr. Justice Harlan, in delivering the opinion of the court in National Bank *v.* Insurance Company, 95 U. S., 673, 679. 'Both reasonable and just that its own words should be construed most strongly against itself.' To the same effect is London Assurance, etc. *v.* Companhia, etc., 167 U. S., 149, 159, and 'Queen of the Pacific,' 180 U. S., 49, 52."

The only exemption in the bill of lading while the cotton was being compressed was that the defendant would not be charged with "deviation or unavoidable delay."

In the case of Deming *v.* Merchants' Cotton Compress & Storage Company (Tenn.), 17 S. W., 91, it appears that:

> "The carriers selected by contract, and by usage

(as to those who had no contract), the compress company as their agent, and agreed to be bound on delivery to it when they executed bills of lading. It was competent for them to do this, and they did it; and while doing so, those who had contracts with the compress company, recognizing it as a special risk before the cotton came actually into their depots or cars, stipulated with their agent, the said compress company, to carry insurance for their indemnity, as they also had the right to do, while those who had no such contract took this special carrier risk without it, as they also had the right to do. But the compresses of the company did not thereby become depots, stations, or places of trans-shipment of the carriers, even of those who had none of their own in Memphis, because they contracted, where such carriers issued bills of lading, with reference to intended shipment over lines which did have, and the same rule applies to them as initial lines, either alone or in association with others."

The Court further said:

"General causes of exemption from loss by fire will be construed to relate alone to loss in depots, stations, on the cars, or in places of trans-shipment of the carrier after actual custody of the cotton, and held inoperative to excuse from liability for this loss. These limitations upon the common-law liability of a common carrier are not favored. They are to be strictly construed, and limited to the general risk of the carrier after actual custody of the cotton, unless the terms thereof expressly extend to a special risk. Where, therefore, a carrier has affected an arrangement with a compress company to act as the carrier's agent, and receive cotton in the agent's press, and

accepts delivery there by the shipper instead of at the carrier's own depot, and upon such delivery issues the ordinary carrier bill of lading, stipulating for exemption from loss by fire, it will not be construed to relate to fire in the cotton compress. Such a clause will not cover a special risk like this."

In the case of Thomas v. Lancaster Mills, 71 Fed. Rep., 485, the Court said, in referring to similar fire exemption in bill of lading:

"The exemption contemplates a continuous carriage according to the usual course of business and the dangers incident to such carriage. It doubtless comprehended such usual delays as attended transportation in the ordinary dispatch of business. It may be doubted if the exemption included dangers incident to suspended transportation at the mere election of the carrier. It certainly did not contemplate that the carrier during such suspension of transportation might negligently expose cotton to danger that ordinary foresight should have guarded against."

## Independent Contractor.

It is urged as a defense that the Union Compress Co. was an independent contractor with reference to the compression of this cotton.

The bill of lading provided that—

"Each carrier over whose route the cotton is to be carried hereunder shall have the privilege at its own cost of compressing the same, for the greater convenience in handling and forwarding, and shall not be responsible for deviation or unavoidable delays in procuring such compression." R., 12.

This provision had for its purpose only to estop the plaintiffs from claiming damages for "deviation or unavoidable delays," which leaves a clear implication that the railway company was to be charged with the custody and safety of the cotton while it was being compressed. A different construction would extend the exemption beyond the terms of the contract.

One who has by contract assumed certain liabilities cannot free himself therefrom by the employment of an independent contractor, and this principle has been held to be applicable when the contract is merely one implied by law.

Am. & Eng. Ency. Law, vol. 16, page 204.

Montgomery Gas Light Co. v. Montgomery, etc., R. C., 86 Ala., 373.

Atlanta, etc., R. Co. v. Kimberly, 87 Ga., 161.

Waller v. Lasher, 37 Ill. App., 609.

Edwards v. N. Y., etc., R'y Co., 98 N. Y. 245.

Where one lets a contract to build a house, the contractor cannot evade its obligations by subletting it.

In this case, if the compress company, while engaged in the compression of cotton under its contract with the railway company, had injured some third party in his person or property who was under no contract with the railway company, his only remedy would have been against the compress company.

Martin v. R'y Co., 55 Ark., 510.

But there is certainly no reason why the plaintiffs, who had a contract with the Texas & Pacific R'y Co., and not

with the compress company, should be required to pursue the compress company for its negligence in performing what the Texas & Pacific R'y Co. had agreed to do.

While there might have been a right of action in behalf of plaintiffs against the compress company, the railway company was primarily liable, and such action could not have been maintained except through the contract with the Texas & Pacific Ry. Co.

Bank of Ky. *v.* Adams Express Co., 93 U. S., 174.

N. J. Navigation Co. *v.* Bank, 6 Howard, 381.

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**Rules of Texas Railway Commission.**

The defendant further contends that under the rules of the Texas Railway Commission and its own rules and regulations that the defendant was not liable for the cotton destroyed by fire while on cotton compress platforms.

This rule of the railway commission provided that:

> "When cotton is tendered to railway companies upon compress platform which is situated on the track of such railway companies, it shall be the duty of the railroad companies to take charge of and receipt for such cotton in the same manner and on the same terms as they would receive and receipt for cotton when taken at its own depot or platform erected for such transactions; provided, however, that the shipper or the compress company shall in such cases assume the additional risk or insurance involved by such act of the railroad company."

Rule 11 of the railway company contains the same provision (R., 90).

The plaintiffs' evidence showed that they had no knowledge of these rules (R., 100).

The evidence of Mr. Ware and Mr. Buron showed that the Texas & Pacific R'y Co. had no depot or station at Texarkana for the reception of cotton, and all cotton in Texarkana was received by the defendant at the platform of the Union Compress Co. The witness Buron testified that he did not know what he would have done as agent of the company if the cotton had been tendered on the merchandise platform, but that he would have had to receive it and would have sent it down to the compress (R., 92).

The rules mentioned were therefore inoperative as to the cotton shipped from Texarkana, even if plaintiffs had known of them, for plaintiffs delivered the cotton at the place designated and provided by the defendant.

Besides, the rules of the railroad and the Texas Railroad Commission were complied with in the provision requiring the shipper or the compress company to assume the additional risk or insurance involved by such railway company in receiving the cotton, as uncontradicted proof shows that the compress company took out and carried insurance to cover loss by fire, payable to the railway company, and the insurance policies were delivered to the company.

Another reason why the rules referred to should not affect this case is that they evidently were not intended to apply to cases where cotton was received on platforms

and there detained by the railway company for its own convenience for compression. The rules should not extend further than necessary to protect the railway company for the time necessary to place it on board cars and remove it. Since the railway company elected to place the cotton in charge of the compress company on its own account for compression, then the shipper should be relieved of the insurance risk from that time.

The cotton was destroyed after the railway company had determined to compress it and was detaining it for that purpose.

But in order to understand the reasons governing the Railway Commission of Texas in adopting this rule, it is necessary to refer to the statutes of Texas, article 319, of the Revised Statutes of 1895, which reads as follows:

> "The duties and liabilities of carriers in this State shall be the same as are prescribed by the common law and the remedies against them shall be the same, except where otherwise provided by this title."

Article 320 prohibits a common carrier within the State of Texas from limiting their common-law responsibility by inserting exceptions in the bill of lading for the shipment of goods, wares, merchandise, etc.

The Texas Railroad Commission, in adopting the rule referred to, had before them this statute requiring common carriers to accept freight without limiting their common-law liability as insurers on shipment within the State of Texas. It was evidently the intention of the commission to relieve the carriers as insurers on local shipments within the State in consideration of the

convenience given to the shippers by accepting cotton on compress platforms.

But interstate shipments cannot be affected either by the statute or the rule, as frequently decided by the Supreme Court of Texas.

Mo. Pac. Ry. *vs.* Sherwood, 84 Texas, 125; 19 S. W., 455.

R'y *v.* Whitehead (Tex.), 26 S. W., 172.

Houston Direct Nav. Co. *v.* Ins. Co. of N. Am. (Tex.), 32 S. W. 889.

The contract between W. A. Arthur & Co. and the defendant was for an interstate shipment.

Wherefore plaintiffs in error pray that the judgment of the Honorable United States Circuit Court of Appeals for the Eighth Circuit be reversed.

JAMES K. JONES,
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*Attorneys for Plaintiffs in Error.*

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# IN THE
# Supreme Court of the United States

## NO. 176,

W. A. ARTHUR & CO., .....Plaintiffs in Error.

vs.

TEXAS & PACIFIC RY. CO., ...Defendant in Error.

## ADDITIONAL ARGUMENT FOR PLAINTIFFS IN ERROR.

WILLIAM H. ARNOLD,
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JAMES K. JONES,
JAMES K. JONES, JR.,
Of Counsel.

TEXARKANIAN, TEXARKANA.

# IN THE
# Supreme Court of the United States

## NO. 176,

W. A. ARTHUR & CO., .....Plaintiffs in Error.

vs.

TEXAS & PACIFIC RY. CO., ...Defendant in Error.

## ADDITIONAL ARGUMENT FOR PLAINTIFFS IN ERROR.

The court's attention is respectfully directed to the following summary of the evidence in this case:

**Evidence of John C. Ware.**

Mr. Ware testified that he took the compress receipts which he had received for the fifty bales of cotton to the agent of the railway company and surrendered them and took the bill of lading, that he knew that this was the only form of bill of lading which the railway company would issue for interstate shipments. (R. 14-15). The bills of lading were dated September 17th, and the fire occurred September 19,

1900. The compress platforms were the only place the railway company had for the reception of cotton for shipment from Texarkana and had been for several years. Rec. 15, 21.

The regular rate on cotton was 60 cents to St. Louis and 25 cents from there to Utica. (R. 15). He knew that the railway company would not strike out the fire clause, as they were the forms that the Railway Company had furnished and he had tried striking out clauses in previous shipments and had asked the privilege of routing the cotton, which were always denied. R. 16.

The shippers in this case had nothing to do with the compression of the cotton. That was a matter of no concern to them and it was purely for the convenience of the railway company. R. 20.

**Testimony of W. A. Arthur.**

It is shown by the evidence of Mr. Arthur that he had been in the cotton shipping business for many years and that he knew the Texas & Pacific Railway Co. would not issue any form of bill of lading without the fire clause; that he had protested against this clause so often and had been denied the privilege of striking it out, he knew that it would be useless to make the request any further and they had to take the bills of lading with that clause if any at all. R. 27-28.

**Testimony of C. P. Hovey.**

Mr. Hovey, the agent of the Railway Company,

testified that he was not authorized to issue any other form of bill of lading than that containing the fire clause and that the only freight rate he was authorized to quote to shippers to Utica was the 85 cent rate. R. 30-31.

**Testimony of V. E. Buron.**

Mr. V. E. Buron, chief clerk at freight depot, testified that the compress was the only place where the Railway Company received cotton for shipments. (R. 37). The Railway Company paid for compressing the cotton. The Compress Company paid the premiums on the insurance policies. Witness went to the Compress every ten days to check up the amount of cotton there for which his company had issued bills of lading and required the increase of the insurance when necessary. Was authorized to issue bills of lading to Utica, N. Y., (R. 39) by virtue of traffic arrangements between the Railway Companies. Had no authority to issue bills of lading without the fire clause and would not have done so unless there had been instructions given from the general offices in Dallas. The published rate to Utica was 85 cents. (R. 40). There was a higher rate but did not remember what it was. (R. 41). If shippers had demanded the bill of lading on the higher rate without the fire clause he had no authority to issue the same. (R. 45). He would have wired for instructions to Dallas. When he went to the compress he saw the character of the buildings and surroundings

of the compress. Railroads on three sides. No sheds over cotton. R. 45.

**Testimony of George West.**

Mr. Geo. West, the superintendent of the Compress, testified: That he did not compress for any one but the railroads. R. 51.

Owners did not pay for compression. We got 10 cents per hundred for handling and compressing and loading. We carried insurance in behalf of the railroads to cover our liability to them. (R. 51). The platforms were 350 or 400 hundred feet long; the sheds 100 by 200 feet. There were only two fire plugs and these were on the west side, 140 feet apart. The cotton on these platforms had been catching on fire frequently before this fire which destroyed plaintiff's cotton. (R. 53). It was surrounded on three sides by railroads. (R. 54). This compress was more hazardous than the usual run of them. (R. 60). The compress at Little Rock (owned by the company which owned the Texarkana compress) was protected better every way. Had a brick fire wall on the platform close to the only main line of railroad which passed the platform, and the platform was not over 20 feet wide. (R. 61). The Texarkana compress had an open platform all around, from 60 to 100 feet wide, with no covering. (R. 60). The railway agents came down to the platforms from time to time and instructed us about keeping up sufficient insurance and we met their requests when more

insurance was demanded. Buron asked for additional insurance a few days before the fire occurred. R. 60.

On the day the fire occurred there was a high wind and it was a very dry time. There was no watchman kept on the platforms, all the employes were eating dinner at the press. The open platforms were covered with cotton and bagging, and no watchman was there to notice the sparks from passing trains. The nozzle to the hose was disconnected from the hose, in another part of the platforms, and could not be found until it was too late to do any good, and there was not sufficient fire plugs in reach. See the testimony amply sustaining these facts by the following witnesses:

Wagner, R. 45; Baker, R. 62; Gaither, R. 86; Murphy, R. 87.

## ARGUMENT.

The court's attention is especially directed to the cases arising out of a fire which destroyed the cotton in the sheds of the Union Compress Co., at Little Rock, Arkansas, November 14, 1887, two of which cases went to the Supreme Court of the United States:

California Ins. Co. v. Union Compress Co., 133 U. S. 387;

St. L. I. M. & S. Ry. Co. v. Commercial Ins. Co., 139 U. S. 223.

One to the Supreme Court of Arkansas:

Martin v. Railway Co., 55 Ark. 510.

And there was a written opinion by Judge Henry C. Caldwell in another of said cases, the principles of which seem unchallenged except as to the question of the proximate cause.

Marine Ins. Co. v. St. L. I. M. & S. Ry., 41 Fed. 643.

If the decision in the case of Cal. Ins. Co. v. Union Compress Co., 133 U. S. 387, is correct, then we respectfully submit that the judgments of the lower court in this case should be reversed.

The facts in that case show that the St. L. I. M. & S. Ry Co. and the Memphis & Little Rock Ry. Co. had issued bills of lading for cotton in the custody of the Union Compress Co. consisting of several thousand bales of cotton awaiting shipment and that bills of

lading had been issued for most of it by said railroads. The cotton was unprotected against loss by fire, there being no covering on the same, and from some unknown cause a fire broke out and destroyed the cotton. The Union Compress Co. had taken out insurance upon the cotton for the benefit of the railway companies to indemnify them against loss by reason of having issued the bills of lading, and these bills of lading contained a stipulation that the railway companies should not be liable for the destruction of the cotton by fire. The suit was filed by the Union Compress Co. upon the insurance policies for the benefit of said railway companies, and in order to recover it was necessary to show that the railway companies were negligent in failing to take care of the cotton after they had issued bills of lading therefor, and there was a recovery on that ground in the lower court, which was sustained by the supreme court. In other words, it appeared that as soon as the bills of lading were issued the railway company then became chargeable with the care of the cotton.

The court in the last paragraph of the opinion said:

"The only question for litigation was whether the railroad companies were protected by the insurance. The defendant is called upon to perform only its agreement to pay the insurance money in case of destruction of the cotton by fire. Its liability is not dependent up-

on the question whether the liability of the railroads had been discharged, nor is the plaintiff's right of action contingent upon the payment by the railroad companies the value of the cotton burned, but it is contingent only upon the destruction of the cotton by fire under the circumstances which impose a liability upon the railroad companies."

As the railroad companies had written in the bills of lading the fire clauses exempting them from liability, the only ground on which the insurance company was held responsible for the loss in this case was that these companies had left the cotton exposed and had negligently failed to take proper care of same.

In the case of Marine Insurance Co. v. St. L. I. M. & S. Ry., supra, it was contended that there should be no recovery because the owners of the cotton knew that they were placing the same with a railway company which stored it in an unsafe place, that the place where the railway company accepted the cotton at the compress platforms, was unsafe and the owners were guilty of contributory negligence in delivering the cotton there. But the opinion in that case shows that the claim of contributory negligence could not be sustained, that the delivery of the cotton at the sheds by the owners was in no sense the proximate cause of the loss: "Moreover the defendant gave bills of lading for all cotton that was offered to it for shipment, down to the very day of the fire; and it cannot now be heard to say

that it was the fault of any one to trust it to perform its duty."

See also where the same question was discussed in the case of Railway v. Fire Association, 55 Ark. 177:

"The fact that the cotton in question was placed on a platform where it was exposed to danger did not cause the owner to forfeit the protection of the law. The cotton was placed on a platform constructed near the track of the railroad for the purpose of receiving freight for shipment and where the railroad company had been receiving cotton. The owner had the right to place it there, and in doing so did not lose its right to compensation for its destruction or damage occasioned by the negligence of the appellant."

There was ample evidence in the case at bar to show that these platforms had no adequate fire apparatus and the cotton was kept uncovered in a very dry season and this fact was known to the agents of the Railway Company who went down and inspected from time to time, and as the dangers increased got more insurance.

While the appellants had possession of the cotton, it was within their power to take out insurance, but this right was lost when the Compress Company insured it for the defendant. When it was turned over to the Railway Company, plaintiffs had the right to expect that it would use ordinary care to protect it. The fact that the Railway Company took out insur-

ance shows that it considered that it was liable for the negligent destruction of the cotton.

The case of St. L. I. M. & S. Ry. Co. v. Commercial Ins. Co., 139 U. S. 223, and Railway Company v. Martin, 55 Ark. 177, were suits that were brought against the Railway Company some time after the decision in the case of California Insurance Co. v. Union Compress Co. But these cases arose out of the same fire, and on a different state of facts. The cotton for which these suits were brought had never been turned over to the Railway Company and no bills of lading had been issued therefor. The suits were instituted on the theory that because certain cotton for which bills of lading had been issued, was destroyed by fire, the Railway Company ought to pay for the cotton to which this fire spread, which involved the cotton in suit, but recovery was denied.

There is no principle decided in either of these cases that touches any point in the case at bar.

**The Case of Bank of Kentucky v. Adams Express Co. 3 Otto 174 (93 U. S.)**

The facts in this case are peculiarly applicable to the case at bar.

It appears that the Adams Express Co. received a package to be carried from New Orleans, La., to Louisville, Ky. The express messenger took charge of the package and deposited it in the express car for transportation to Louisville and while the car was passing

over a trestle on the line of the L. & N. R. R. the trestle gave way and the train with the express car was thrown from the track and the car with its contents caught fire and was burned together with the package. There was some evidence that the timber of the trestle had decayed and it was contended on the part of the shipper that the express company was liable because of the negligence of the railway company, and the United States supreme court sustained this contention, although there was a stipulation in the bill of lading releasing the express company from liability by reason of "dangers of railroad transportation or by fire or steam."

The court said:

"But the circuit court ruled, the exception did not extend to negligence beyond the carriers own and that of the servants and agents appointed by them and under their control; that it extended to losses by fire resulting from the carelessness of a railroad company, employed by them in the service which they undertook, to carry the packages; and the reason assigned for the ruling was, that the Railroad Company and its employes were not under the control of the defendants. With this ruling we are unable to concur. The Railroad Company, in transporting the messenger of the defendants and the express matter in his charge, was the agent of somebody: either of the Express Company or of the shippers or consignees of the property. That

it was the agent of the defendant is quite clear. It was employed by them, and paid by them. The service it was called upon to perform was a service for the defendants; a duty incumbent upon them, and not upon the plaintiffs. The latter had nothing to do with the employment. It was neither directed by them, nor had they any control over the railroad company or its employes; it is true the defendant had no control over the company or its servants but they were its employers; presumably they paid for its service; and that service was directly and immediately for them. Control of the conduct of an agency is not in all cases essential to liability for the consequences of that conduct. If anyone is to be affected by the acts or omissions of persons employed to do a particular service surely it must be he who gave the employment. Their acts become his, because done in his service and by his direction. More over a **common carrier who undertakes for himself to perform an entire service has no authority to constitute another person or corporation the agent of his consignor or consignee.** He may employ a subordinate agency; **but it must be subordinate to him,** and not to one who neither employs it nor pays it, nor has any right to interfere with it.

The court further said:

"It (in referring to the limitation of liability) exempts the defendants from responsibility for loss by fire, caused by the acts or omissions of all persons who

are not agents or agencies for the transportation.

"That is a large restriction; and beyond that, in our judgment, the exception in the present case does not extend.

"To the opinion we have thus expressed we find direct support in the case of Hooper v. Wells, 27 Cal. 11. There an express Company had undertaken to transport gold-dust and bullion from Los Angeles to San Francisco, and deliver to address. The receipt for the property contained the following stipulation: 'In no event to be liable beyond our route, as herein receipted. It is further agreed, and is part of the consideration of this contract, that Wells, Fargo & Co. are not to be responsible except as forwarders nor for any loss or damage arising from the dangers of railroad, ocean or river navigation, fire, etc., unless specially insured by them, and so specified in this receipt.' In the course of the transportation, the messenger of the carriers who had the property in charge took it on board a steam-tug, for the purpose of placing it on a steamer bound to San Francisco. On the way to the steamer, the boiler of the steam-tug exploded, in consequence of carelssness of its officers, and the gold-dust and bullion were thereby lost. The steam-tug did not belong to the express company; nor was it or its officers under their control. Yet the court adjudged that the managers and employes of the steam-tug were in legal contemplation the managers and employes of the carrier,

and that the restrictive clause in the receipt did not exempt the carriers from liability for loss occasioned by the carelessness of those employes. To the same effect the case of Christenson v. American Express Co., 15 Minn. 270, and the case of Machu v. Railway Co., 2 Exch. 415, though arising under the Carrier Acts. of II Geo. IV. and I Wm. IV., is very analogous. The statute declared that the carrier should be liable to answer for the felonious Acts of any coachman, guard, bookkeeper, porter, or other servant in his employ. The court considered that all parties actually employed in doing the work which the carrier under took to do, either by himself or his servants, were to be regarded as his servants, within the meaning of the act. Baron Rolfe said, the right as against the carriers arises not from the relation of master and servant, but by virtue of the contract into which they have entered to deliver the goods. This was said in answer to an argument like the one relied upon in this case, that the relation of master and servant could not exist between the carriers and the servants of a subcontractor."

In the case of Lancaster Mills v. Merchant's Cotton Press & Storage Co., (Tenn.) 14 S. W. 317, it is shown that where a bill of lading of cotton gave the railroad company the privilege of compressing the cotton at its own expense for the convenience of carriage and exempting it from loss by fire, the railway

company would be liable for loss of cotton by fire if caused by negligence, while it was stored in the warehouse for compression.

In the case at bar it is shown that the defendant in error had no place in Texarkana for the reception of cotton for shipment except at the compress platforms, and in this case when the cotton was received there, defendant ordered its compression and detained it at the platforms, which the uncontradicted proof shows was unguarded and unprotected against fire and we contend that it was an act of negligence on the part of the railway company to keep said cotton there for any length of time, and that by so doing it assumed the risk incident thereto, which was evidently understood and recognized by the railway company, as it demanded and received from the Compress Company insurance upon the cotton, which was paid for by the Compress Company, and after the insurance was effected it was immaterial to the Railway Company what the risks were. It appears that the insurance was to cease after the cotton left the platform. This insurance must have been effected for some purpose. The policies read that they covered the legal liability of the Railway Company. If the contention of the Railway Company in this case is correct that it was not responsible for the cotton while it was on the compress platforms, it cannot be perceived why it required the Compress Company to take out the insurance. These facts bring

the case at bar within the lines of California Ins. Co. v. Union Compress Co., supra.

There was also unquestioned negligence on the part of the employes of the Union Compress Co. in failing to guard or watch the cotton while it was on the platforms or take notice of the sparks flying from the passing locomotives which had frequently caused the cotton to catch before, and from which source the cotton evidently caught at this time; and under authority of the decision of the Bank of Kentucky v. Adams Express Co., supra, that the negligence of the Compress Company, which was acting as agent for said company, under this contract in suit, was imputable to said Railway Company.

The language of the contract between the plaintiff and defendant is that "Each carrier over whose route the cotton is to be carried herein shall have the privilege at its own cost of compressing the same, etc." (R. 12). It was clearly intended by this language that the compression of the cotton, if done at all, should be the act of the carrier, and no permission was given to employ a compress company to act as the **agent** for the **shipper**, and there is no implication that the shipper was to look to a compress company for damages in case there should be a negligent loss of the cotton.

On the authority of the Bank of Kentucky v. Adams Express Co. we feel sure that the primary lia-

bility rests upon the carrier by reason of the contract, and that it was not within the meaning of the contract that the responsibility for negligence in the loss of the cotton might be averted by the Railway Company by subletting the performance of a part of said contract to a third party; and in procuring such agency in carrying out said contract, the Railway Company could not avoid its liability under the contract. Certainly it will not be contended that where one obligates himself to perform certain service, he can evade the responsibility by employing some one else to act in his place. In writing that opinion, the Honorable Circuit Court of Appeals overlooked the fact that the plaintiff was claiming through a contract whereby the compression of the cotton was to be done by the **carrier** and there was no exemption of liability under this provision of the contract except for "deviation and delay," which are not the grounds in this suit.

On this question we quote the following extract from the opinion of the court in the case of Bank of Kentucky v. Adams Express Co.:

"Now, can it be a reasonable construction to give to the contract between the defendants and the plaintiffs, that the former, who had agreed to carry and deliver the packages at Louisville, reserved to themselves the right to employ a subordinate carrier, arrange with him that he should be responsible only for ordinary vigilance against fire, and by that arrange-

ment relieve themselves from what without it would have been their clear duty. Granting that the plaintiffs can sue the Railroad Company for the loss of the packages through its fault, their right comes through their contract between it and the defendants. They must claim through that. (N. J. S. Nav. Co. v. Bk., 6 How., 381). Had the packages been delivered to the charge of the Railroad Company, without any stipulation for exemption from the ordinary liability of carriers, it would have been an insurer both to the Express Company and to the plaintiffs. But as they were not so delivered, the right of the plaintiffs to the extremest constant vigilance during all stages of the carriage is lost, if the defendants are not answerable for the negligence of the Railroad Company, notwithstanding the exception in their bills of lading."

The court should have submitted to the jury the question whether the platforms of the Union Compress Co. were held out to the general public by the defendant as the only place in Texarkana at which it would receive cotton for shipment; and said place and no other was used by the defendant as its depot for cotton shipments, that it was known to the agents of the Railway Company that said platforms were unsafe for the storage of cotton, because there was no proper apparatus for extinguishing fires and no shed, covering or watchman provided for the protection of said cotton against fires, and that keeping said cottton in such un-

safe place, after it had been delivered to the defendant for shipment was negligence which caused the destruction of said cotton. There were not sheds, covering, fire apparatus or watchman to protect the cotton. R. 53, 54, 60 and 61.

We submit that on the evidence introduced as to the condition of the platforms and the unprotected condition of the cotton, with no fire apparatus, and the trains passing on three sides of the platforms constantly where the cotton was exposed in a dry season, made a question which should have been submitted to the jury as to whether there was negligence on the part of the Railway Company in constituting this as its receiving station for cotton and in keeping it there for its own convenience for compression.

The circumstances under which a court may direct a verdict for the defendant was discussed in the case of Marande v. Texas & Pacific Ry Co., 184 U. S. 173, which was a suit for the destruction of cotton by fire which was not guarded or taken care of by the defendant and it was held that:

1. That the obvious danger resulting from the use of locomotives about so easily ignitable a material as cotton was clear, and the jury would have been reasonably justified in drawing the inference that it had caused the fire;

2. That the proof showed negligence in the care of the property;

3. That the jury would have had reasonable ground to infer negligence from the inadequacy of the fire apparatus, and from the want of instructions as to its use, or competent men to handle it."

And on page 192 the court, Mr. Justice White, said:

"That the storage of such a great mass of cotton in the open sheds and on the wharf, with only a few narrow gangways from front to rear, with no passage-ways between the tiers running lengthwise of the sheds, so as to enable the cotton to be inspected and to be accessible upon an alarm of fire, with substantially no tarpaulins or other covering, and the operation of the locomotives in and around the open sheds and in front of the wharf among the cotton so situated, at least afforded sufficient proof to go to the jury, we think is too clear for discussion."

The uncontradicted proof is that the Compress Company was acting under the direction of the Railway Company in holding said cotton for compression under and by virtue of the authority given to said defendant by section 5 of the bill of lading, which provides that:

"Each carrier over whose route the cotton is to be carried hereunder shall have the privilege at its own cost of compressing the same for greater convenience in handling and forwarding and shall not be respon-

sible for **deviation or unavoidable delays** in procuring said compression." R. 12.

The plaintiffs had received from the Compress Company compress tickets for their cotton and when they got ready to ship they took the compress receipts to the Railway Company and turned them over and received a bill of lading for the shipment of said cotton to Utica, N. Y. Thereupon the Railway Company surrendered to the Compress Company said tickets, took a receipt for the cotton for the account of the Railway Company, directed the Compress Company to compress said cotton and to load the same on cars. The Compress Company took out insurance in favor of the Railway Company and then said cotton was blocked out from other cotton, carried to the press (R. 94) and would have been compressed if the fire had not intervened.

After surrendering the tickets the plaintiffs had no further claim upon the Compress Company and it ceased to be their agent; and when the Railway Company began to carry out the provisions of the bill of lading by undertaking the compression of the cotton, the Compress Company became the agent of the Railway Company, and the negligent loss of the cotton is imputable to said defendant; the defendant is estopped from claiming that the bill of lading was not in force, because it was acting thereunder in directing the compression of the cotton.

The platforms of the Compress Company were full of cotton. Railroads ran on three sides of it and there were no sheds except a small one in the center, and the platforms covered with cotton were exposed and uncovered from 60 to 100 feet in width all around. Locomotives were constantly passing on all sides. There was no fire apparatus or watchman and these facts were undoubtedly known by the agents of the Railway Company. We submit that the court ought to have left the question to the jury whether or not the Railway Company was not negligent in keeping this cotton there, and also the question whether the Compress Company was not negligent while acting for and instead of the Railway Company under said bill of lading, which negligence caused the destruction of the cotton.

The Honorable Circuit Court of Appeals erred in finding that the bill of lading in this case was not to be an executed and complete contract of shipment until the cotton was loaded on board the cars, because the proof shows that there was nothing further to be done by the shipper, and that the duties of the railway company had begun and said railway company had actually begun to act under the powers and authorities of said bill of lading in proceeding to have the cotton compressed; there is no proof whatever that there was any understanding between the agent of the railway company and the shipper that the bill of lading was

not to become effective until after the cotton had been loaded on the cars.

The Court of Appeals also erred in its conclusions that there is a usage in the southwest and at Texarkana that where railroad companies issue bills of lading for cotton on compress platforms it is not intended that the liability of the carrier will atttach until the cotton is actually delivered upon its cars. And this court further erred in assuming that in such cases there is a usage that the cotton is still considered to be in the hands of the shipper through the compress company for the purpose of being compressed, and that this course is pursued as a matter of convenience by the compress company and the shipper. There is no proof whatever of such usage or custom and no such usage or custom prevails and there is no ground on which it can be found to exist as a matter of law. There is no reference made to an alleged usage of this kind, as will be shown by the record of the trial, except in the **answer which defendant made no effort to sustain by proof.**

And in this case the bill of lading gave the defendant the right to have plaintiffs' cotton compressed for the convenience of the defendant in handling it; and it was optional with the railway company to compress or not; the act of compression in the event said option was exercised was the act of the defendant under the power given in the bill of lading, whether done by the

railway company or its employes, and it was shown that the railway company in the exercise of its right to compress and load it, agreed to pay therefor at the rate of 10 cents per hundred pounds and under that employment the cotton was blocked out and carried to the press and would have been compressed the next day if it had not been destroyed by reason of the dangerous conditions shown in the evidence.

The Court of Appeals erred in finding that the defendant had a depot station in Texarkana on the Texas side (other than the compress platforms) where plaintiffs' cotton would have been received for shipment, when the proof is uncontradicted that it did not have and it was not contended by the defendant that it had a depot; the railway company received all of its cotton for shipment on the platforms of the compress company, which is located on the line of the railway in Texarkana, Texas. The court also erred in finding that the compress platforms were located in Texarkana, Arkansas, when the uncontradicted proof is that said compress platforms are in Texarkana, Texas.

There was also error in holding that the defendant was not liable for the loss of plaintiff's cotton on account of rule 13 of the Texas Railroad Commission, which provides that:

"When cotton is tendered to railroad companies upon compress platforms which is situated on the track of said railroad companies it shall be the duty of the railroad companies to take charge of and receipt

for such cotton in the same manner and on the same terms as they would receive and receipt for cotton when done at its own depot or platforms erected for such transactions, provided, however, that the shipper or the compress company shall in such cases assume the additional risk of insurance involved by the act of the railroad company."

But it is clearly shown in this case that the defendant had no depot or platform **erected for such transactions**, in fact had adopted the platforms of the Union Compress Co. as its depot or place for the reception of cotton and plaintiffs' had no option to carry it elsewhere for delivery; and the proof shows that the compress company in this case **had assumed the additional risk of insurance** involved by the act of said company by taking out and paying for insurance upon cotton payable to said railway company, while it remained on their platforms and literally complied with the conditions prescribed by the railroad commission.

There was error in the application of the decision of the Missouri Pacific Ry. Co. v. McFadden, 154 U. S. 155, to this case, because the demurrer to the answer in that case admitted as true the allegations of the answer that it was understood that the liability of the common carrier was not to attach until said cotton was loaded; also in applying the case of Edward & Co. v. Texas Midland Ry. Co. (Tex. Civ. Apps.), 81 S. W. 800, because in that case the facts are not only dissimilar, but the contract of shipment had not been completed. In that case it was the duty of the shipper to give the

shipping directions to the compress company, while in this it was made the duty of the railway company to give and it did give the shipping directions.

**Limitation in Bill of Lading Against Loss by Fire Void**

The testimony of Arthur and Ware Shows that they had often demanded of the Texas & Pacific Ry. Co. the right to ship their cotton without the fire clause and this right had always been refused. (R. 16, 27 and 28). And further that the rate of 85 cents to Utica, N. Y., per hundred pounds for cotton was the only published freight rate which was furnished shippers. (R. 15). The railway agent himself testified that he was not authorized to quote any other rate for cotton except the 85 cent rate and had no authority to issue any other form of bill of lading. (R. 30-31). The chief clerk testified that if a demand had been made on him to issue a bill of lading without limitation at the higher freight rate he had no authority to issue it without instructions from Dallas, Texas. R. 40.

Now it is clear that Arthur & Co. were acting as reasonably prudent men in not continuing to make demands in every case of shipment when they had been so plainly told on different occasions that this was the only rate and the only form of bill of lading, and the testimony of the agent and his chief clerk show that

they had no authority to issue and would not have issued any other form of bill of lading at any other rate without special instructions from Dallas. In other words, it was the object of the Railway Company to place it beyond the power of the ordinary shipper to get what the law declares he is entitled to. Certainly there was enough evidence to submit the question to the jury as to whether this bill of lading, as all others had been, was not imposed upon the denfendants under "duress of circumstances," which would not be binding as shown in the case of N. Y. Cent. Ry., Co., v. Lockwood, 17 Wallace 357. There was here no "real freedom of choice and no reasonable and practicable alternative" which is necessary, as shown by the case last above quoted from, in order to make the limitation binding.

In our opinion the case of Railway v. Cravens, 57 Ark. 112, contains a correct statement of the law that where a railway agent has no authority to issue a bill of lading on another form at another rate the limitation is not binding.

It was contended in the lower court that because the Texas & Pacific Railway Co. had no line of railway running from Texarkana to Utica the shipper had no right to require the Company to issue a bill of lading on its common law liability.

The defendants took another position inconsistent with that, wherein it attempted to prove that there was a higher rate on which a bill of lading would have been issued with restrictions. R. 82.

But it is shown by the testimony of the agent that he had the right under the traffic arrangements with this road and others to issue a through bill of lading, and that seems not to be questioned by any testimony in the case. R. 39.

It is also shown that tariff sheets furnished to the shippers quoted the through rate and the defendant held itself out as a common carrier who would issue through bills of lading to Utica.

The following authorities show that:

"Where a common carrier holds itself out as transporting such goods as plaintiff offered it for shipment, and to the points to which he desired to ship them, it is liable to him for not receiving and shipping them, though those points were beyond its own line."

Chicago, St. L. & P. R. Co. v. Wolcott, 39 N. E. 451; 141 Ind. 267.

"Doubtless a common carrier may so hold himself out to the public as to make himself liable for not receiving and conveying goods beyond his own line."

R. R. Co. v. Morton, 61 Ind. 577.

C. N. O. & T. P. R. Co. v. I. C. C., 162 U. S. 184-197.

For the further arguments of this question see the original brief filed in this case.

The Plaintiff in Error respectfully prays that the judgments of the lower court be reversed and that this cause be remanded.

WILLIAM H. ARNOLD,

Attorney for Plaintiff in Error.

Jan. 10, 1907.

JAMES K. JONES,

JAMES K. JONES, JR.,

Of Counsel.

# Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 176.

W. A. ARTHUR and JOHN C. WARE, partners as W. A. Arthur & Co., Plaintiffs in Error,

vs.

TEXAS AND PACIFIC RAILWAY COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

## BRIEF FOR DEFENDANT IN ERROR.

### Statement.

Brief for plaintiffs in error not having been received, we subjoin the following brief statement in this case:

This suit was originally brought in the United States Circuit Court for the Western District of Arkansas, Texarkana division. The amount involved is $2,605.53, being the value of fifty bales of cotton destroyed by fire while on the platform of the Union Compress Company at Texarkana, Texas, on the 19th day of September, 1900, for which cotton, plaintiffs in error had received a bill of lading from the Railway Company to transport the same to Utica, N. Y.

The bill of lading contained the usual "fire clause" and another authorizing the carrier to compress the same for his convenience,

and exempting it from responsibility for deviation or unavoidable delays occasioned thereby.

Plaintiffs alleged that this suit is one arising under the laws of the United States, the defendant being a corporation created by laws of Congress.

The plaintiffs alleged that the Railway Company under a partnership and traffic agreement with connecting carriers was authorized to give a bill of lading for the cotton through to destination, and that by virtue of its arrangements with other carriers, held itself out to be a carrier from Texarkana to Utica, and represented itself to be such carrier for said cotton. It also alleged that the provision exempting the railway company for loss by fire was void because (1) it was received by plaintiffs under duress, (2) because it was unreasonable, (3) because it was without consideration; that the rate charged for the services was the regular rate, and the plaintiffs had no option to receive any other form of bill, and that they did not assent to it. They also alleged that the cotton was received by defendant September 17, 1900, on the platform of the Union Compress Company: that immediately after the cotton was received by the defendant, the defendant delivered it to the Union Compress Company as its agent to have it compressed for the convenience of the defendant railway company; that the platform was not a proper place to store the cotton; that the Compress Company as agent for the defendant had failed to provide a safe place for such storage, and to keep the same in proper order; and also that said cotton was destroyed by fire on the 19th of September, 1900.

Defendant pleaded as defense the "fire clause" in the bill of lading, and also the clause relating to compressing the cotton.

The answer admitted that defendant was authorized to execute the bill of lading, but denied that it was a partner with connecting parties. It also denied that the freight rate charged was the only one between Texarkana and Utica, N. Y., denied that no option was given plaintiffs to ship the cotton without the "fire clause," and denied that it acted as agent for connecting lines in making the bill of lading, except to guarantee the through rate of freight.

It denied that it delivered the cotton into the custody of the Compress Company, but alleged that it was delivered to said company by the plaintiffs, and was tendered to the defendant on said platforms of the compress company by plaintiffs, and denied that the compress company was its agent for the purpose of compressing

cotton, and denied also the acts of negligence set up in the complaint; denied that the cotton was received by defendant to be shipped under the bill of lading, and alleged that its liabilility was limited to its own line of railway; and that it was not liable for any loss or damaged sustained which did not occur on its own railway. Defendant further pleaded that it neither owned or controlled any line of railway in the state of Arkansas, that its entire line was in Texas, and that the compress is located a few hundred yards west of the Texas line. In its amended answer, defendant charged that the compress company was an independent contractor, to whom was intrusted the compression of the cotton before its delivery to defendant, and which acted independently of defendant, and was not under or subject to its control.

The facts proved beyond dispute were: That in accordance with a custom prevailing in Texas and in the Southwest, the plaintiffs delivered fifty bales of cotton to the Compress Company on or about the 12th day of September, 1900, for which it received tickets from the Compress Company, acknowledging such receipt (Rec., 21, 22, 23. For a statement of the usual course of proceedings at the Compress see Rec., pp. 42-44.). That on the 17th day of September, the plaintiffs took the tickets to the railway company and asked for and received a bill of lading from Texarkana to Utica, N. Y. (Rec., pp. 13, 14, 15). That on the 19th of September, the cotton, being on the platform of the compress company and not having been compressed, it was burned, the fire being caused by a spark from a passing locomotive; that the compress company was an independent corporation, distinct from any railway, whose business was to compress cotton and to care for it while in its possession (Rec., p. 57, *et seq.*) That the railway company had not in any way, whether by word or act, constituted said compress company its agent for any purpose whatever (Rec. *passim.*). That the railway company had no control or interest in said compress company, or its business or its management, or as to protection against fire, and also that at no time had the cotton been in the railway company's actual possession (Rec., 43, 69).

It was also proved that the Texas Railroad Commission had issued an order requiring railway companies to issue bills of lading when Compress company receipts were presented therefor and that defendant in error had made a rule directing its agents to carry out the said order of the Commission (Rec., p. 90).

*Statement by Circuit Court of Appeals.*

A more succinct statement of the facts was made by the Circuit Court of Appeals, to which court the writ in this case was issued, namely (Rec., p. 112):

"This is an action instituted by plaintiffs in error against the defendant in error to recover $2,605.53, the value of fifty bales of cotton, alleged to have been delivered to the defendant company by plaintiffs at Texarkana, Texas, to be transported to Utica, New York. The defendant company, a railroad corporation in the State of Texas, had its depot station in Texarkana, on the Texas side, the State line between Texas and Arkansas running through said city.

The defendant company had no line of railway from Texarkana to Utica, New York; but had a traffic arrangement for the division of revenues between it and connecting carriers between Texas and Utica. The defendant company had authority to give a bill of lading for the shipment of cotton made over the through line, the rate of shipment from Texarkana to St. Louis being 60 cents per hundred pounds, and from there to Utica 25 cents, making in the aggregate 85 cents. The petition alleged that the defendant company held itself out as a common carrier for such transportation.

The Union Compress Company was an independent corporation, engaged in the business, at Texarkana, of compressing cotton delivered by shippers at said point for transportation. Its platforms for such purpose were on the Arkansas side of the State line. According to the usage of such business, which prevailed in that place, as at other shipping points in Texas and Arkansas, when cotton was brought in by shippers, it was unloaded at the platforms of the Compress Company and a receipt taken therefor from said last-named company by the shipper, which he would carry to the agent of the railroad company, who would take the same up and issue, based thereon, a bill of lading to the shipper. The Compress Company retained possession of the cotton until such time as it could compress the same, and when compressed it delivered the same on board the cars of the railroad company.

The bill of lading in this case contained the following stipulation: 'That neither The Texas & Pacific Railway Company nor any connecting carrier handling said cotton shall be liable for damages to or destruction of said cotton by fire, nor for any loss thereof or damage thereto by causes beyond its control.' It contained the further stipulation that: 'Each carrier over whose route the cotton is to be carried hereunder shall have the privilege, at its own cost, of compressing same, for greater convenience in handling and forwarding, and shall not be responsible for deviation or unavoidable delays in procuring such compression.'

Two days after the cotton was so left upon said platform, it was destroyed by fire, in connection with a large amount of cotton belonging to other shippers, with which it had been mingled. The

fire was caused by sparks communicated to some part of the quantity of cotton on the platform from a passing engine of another railroad company."

After reciting the allegations of the pleadings, it continues:

"The evidence tended to show that the cotton while on said platform was not properly safeguarded against accident or destruction by fire, and that the servants of the Compress Company perhaps did not keep sufficient watch over the cotton to prevent its destruction in the event of fire being communicated to it by railroad engines passing said platform.

The Railroad Commission of the State of Texas had adopted and maintained in force the following rule in reference to the receipt of cotton by railroads in Texas located on cotton compress platforms:

'When cotton is tendered to railroad companies upon compress platforms, which is situated on the track of such railroad companies, it shall be the duty of the railroad companies to take charge of and receipt for such cotton in the same manner and on the same terms as they would receive and receipt for cotton when taken at its own depot or platform erected for such transactions; provided, however, that the shipper or the compress company shall in such cases assume the additional risk of insurance involved by such act of the railroad company.'

Pursuant to said regulation the defendant railroad company adopted rule 11, covering substantially the requirements of said regulation.

The plaintiffs were cotton buyers at Texarkana; and had for some time prior to the shipment in question been shipping cotton on like arrangements with the defendant company, and were familiar with the usages that obtained at said place in respect of such shipments."

On defendant's motion, the Court instructed the jury to return a verdict for defendant, and judgment thereon was duly entered. Plaintiffs sued out a writ of error to the Circuit Court of Appeals for the Eighth Circuit, which Court affirmed the judgment. The case is now brought before this Honorable Court by writ of error to said Circuit Court of Appeals.

The assignments of error appear in the record at pages 122, 123.

## ARGUMENT.

**The stipulations in the bill of lading that Defendant should not be liable for the loss or destruction of the cotton by fire, nor for loss or damage thereto by causes beyond its control, or not occurring on its own line, and that in having the same compressed it should not be responsible for deviation or unavoidable delays, are all valid and binding upon the Plaintiff in this case.**

The validity of the fire clause in identically the same kind of a bill of lading, and for the same fire that destroyed the Plaintiff's cotton, was sustained by the Circuit Court of Appeals of the Fifth Circuit, in *Cau vs. T. & P. Ry., 113 Fed., 91 ;* s. c., *194 U. S., 427.*

In that case Jovite Cau obtained from the T. & P. Ry. a bill of lading for a certain number of bales of cotton, to be transported from Texarkana, Texas, to New Orleans, Louisiana. The bill of lading provided that the Railway Company should not be liable for damage to or destruction of the cotton by fire, and it was claimed that the stipulation in the bill of lading was invalid because it had not been agreed to by plaintiff, and he did not, in fact, know that the bill of lading contained such an exemption. The cotton, at the time of its destruction, was in the possession of the Union Compress Company, to which it had been delivered to be compressed, and that Company had obtained insurance on it for the benefit of the Defendant, it being the custom of that Company to effect insurance for the benefit and in the name of each particular railroad receiving cotton at its compress.

The Circuit Court of Appeals affirmed a judgment in favor of the Railway Company, sustaining the validity of the fire exemption clause, and on appeal to the U. S. Supreme Court that Court says :

" It is well settled that a carrier may limit his common law liability. York Mfg. Co. v. Ry. Co., 3 Wall, 107. But it is urged that a contract must be upon a consideration other than a mere transportation of the property, and an option and opportunity must be given to the shipper to select under which, the common law or limited liability, he will ship his goods. If this means that the carrier must take no advantage of the shipper, or practice no deceit upon

him, we agree. If it means that the alternative must be actually presented to the shipper by the carrier, we cannot agree. From the standpoint of the law, the relation between carrier and shipper is simple. Primarily the carrier's responsibility is that expressed in law, and the shipper may insist upon the responsibility. But he may consent to a limitation of it and this is the option or opportunity which is offered to him. What other can be necessary? There can be no limitation of liability without the assent of the shipper, and there can be no stipulation for the exemption by the carrier, which is not just and reasonable in the eye of the law. Inside of that limitation, the carrier may modify his responsibility by special contract with the shipper, and the bill of lading limiting the liability constitutes such a contract and knowledge of the contents by the shipper will be presumed."

It is again urged that there was no independent consideration for the exemption expressed in the bill of lading. This point was made in *York Mfg. Co. vs. Railway, 3 Wall, 107.* In response it was said:

"The second proposition is answered by the fact that there is no evidence that the consideration was not given for the stipulation. The Company, probably, had rates of charges proportioned to the risk they assumed from the nature of the goods carried, and the expectation of loss by fire must necessarily have effected the compensation demanded. Be this as it may, the consideration expressed was sufficient to support the entire contract made. In other words the consideration expressed in the bill of lading was sufficient to support its stipulations. This effect is not averted by showing that the defendant had only one rate, which was the rate also of all other roads, and presumably it was adopted and offered to shippers in view of the limitation of the common law liability of the roads."

In Hutchison on Carriers, Section 240, it is said:

"Every man of ordinary intelligence knows that no individual or company, engaged in the business of carrying to distant places, now undertakes to carry his goods subject to the old common law liability of the carrier. He knows, moreover, that bills of lading are given, not only in evidence of receipt of the goods, but as expressing direct notice that they will be carried on certain terms. Knowing this, he cannot be wilfully blind and plead ignorance, when it was his duty to know, and knowing, in such cases, is assenting. If it was his intention to hold the carrier to his common law liability he should have said so, and have either declined to employ him, or have sued him for his refusal, after tendering a reasonable sum for his services and risk."

If the clause in the bill of lading exempting the Railway Company from liability for loss by fire is valid, then the stipulation that the Defendant should not be liable for loss of the cotton by causes beyond its control is equally valid and binding on the shipper.

The uncontradicted testimony in this case shows that the Railway Company had no control whatever over the Compress Company. The Compress Company was engaged in the business of receiving, storing, compressing and shipping cotton, and in doing that it acted independently of the Railway Company. Its methods, in handling, compressing and loading the cotton on the cars was entirely independent of any management or control by the Railway Company. Its employees were not under the control nor direction of the Railway Company. Neither did the Railway Company have the right, power or authority to direct the employees of the compress company in the manner of doing their work, or of handling, storing or protecting the cotton on its platform, nor in providing facilities for fighting fire. The loss of the cotton in question did not occur after the voyage began, but it occurred before the Defendant received the possession of the cotton and at a time when the cotton was not under its control. Besides, the contract expressly stipulates that in having the cotton pressed the Defendant should not be responsible for deviation or delay.

The authority that sustains the validity of one of the stipulations in the contract will sustain the validity of all of them, because it cannot be said that any of them are unreasonable, or such as Defendant did not have a right to make.

While the shipper ordinarily would have the right to insist on the Railway Company receiving and transporting his property under his common law liability, he could only compel the Railroad Company to transport to the end of its line. He would have no right to demand the bill of lading for through shipment of the cotton, beyond the line of the initial carrier, on a common law liability *Railway vs. Sharp, 40 S. W., 71 ; Ry. vs. Hurst, 67 Ark., 407 ; Exp. Co. vs. Welcome, 29 S. W., 34.*

The fifty bales of cotton in this case was on the platform of the Union Compress Company and the Plaintiffs desired to ship the same to Utica, New York. They filled out a bill of lading on blanks that were furnished them by the Defendant and carried same to the agent who signed it. They knew of all the stipulations in the bill of lading, but made no objection to them at the time.

It is also uncontradicted that Defendant had a different and

higher rate of freight from Taxarkana to Utica, N. Y., by which they would have accepted the cotton for shipment without any limitation as to its liability. This rate was never used because it was so much higher than the rate charged Plaintiffs that shippers never availed themselves of it, it being $1.37 per hundred pounds and the rate charged Plaintiffs being 85 cents per hundred pounds. But, as was said in *York Mfg. Co. vs. Ry., supra* :

" Be that as it may, the considerations expressed in the bill of lading was sufficient to support the entire contract."

## The Compress Company was not the agent of the Defendant Railway Company.

Plaintiffs in error contend that although the stipulations in the bill of lading may be valid and binding on them, yet the Defendant would be liable because they say the cotton was destroyed by the negligence of the employes and agents of the Defendant.

To sustain this theory, they undertake to make the Compress Company and its employes the agents of the Defendant, and to show that the Compress Company was negligent in not having its platform enclosed and in not having a sufficient number of water hydrants, and in not having sufficient number of men employed and the failure of those who were employed to extinguish the fire. It is a well recognized rule of law that a Railway Company will not be permitted to contract against liability for its own negligence. With that limitation, there in no restriction upon the right of the Defendant to make the contract in question. But was the alleged negligence of the Compress Company chargeable to Defendant? We think not.

The Plaintiff had been engaged in the business of cotton buyers at Texarkana for a number of years. They directed that all their cotton should be placed on the platform of the Union Compress Company, where it could be classified by their classifier. The course of dealing which had been pursued for a number of years, and with which Plaintiffs were evidently familiar, was that when the owner of the cotton desired to ship the same, he would carry receipts of the Compress Company to the Railroad Company's agent, and exchange them for the bill of lading; that the Railroad Company would then instruct the Compress Company to press the cotton and would give it directions on which cars the same

should be loaded. The Compress Company would then take out insurance to protect the Railroad Company against legal liability for loss of said cotton by fire. It would press the cotton and load it on the cars of the Railway Company. Until that was done, the Railroad Company had no control or management of the cotton. It was a matter of convenience to all parties. In this particular instance, the same course was pursued, and before the cotton was pressed it was destroyed by fire. The cause of its destruction was beyond the control of the Defendant, and was not through its negligence, and under the terms of the contract between it and the Plaintiffs, it is not liable or responsible for such destruction.

In *Mo. Pac. vs. McFadden, 154 U. S., 156*, the Court holds that notwithstanding the Railroad Company may have given a bill of lading for the goods, it is not liable for their destruction or for damage to same, until it has actually received possession. The Court says:

"The elementary rule is, that the liability of a common carrier depends upon the delivery to him of the goods which he has to carry. The rule is thus stated in the text books: 'The liability of common carrier begins when the goods are delivered to him or his proper servants, authorized to receive them for carriage' (Redf. Carriers, 80). 'The duties and the obligation of the common carrier with respect to the goods, commenced with their delivery to him, and this delivery must be complete, so as to put upon him the exclusive duty of seeing to their safety. The law will not divide the duty of the obligation between the carrier and the owner of the goods. It must rest entirely upon the one or the other. And until it has become imposed upon the carrier by delivery, he cannot be held responsible for them' (Hutchinson on Carriers, 82)."

In this case, Plaintiffs in Error carried receipts which it held from the Compress Company for the cotton, and delivered the same to the Defendant-in-Error, and procured the bill of lading introduced in evidence, in which it was stipulated that the Defendant-in-Error would not be liable for loss of said cotton by fire, nor for the loss or destruction of same, by causes beyond its control. Both these stipulations are valid and binding, under the authorities hereinbefore referred to. Plaintiffs in Error seek to avoid said stipulations and agreement by showing that the cotton was destroyed through the negligence of the Compress Company, and they then seek to hold the Railroad Company liable for the omissions of the Compress Company, on the ground that it had made the Compress Company its agent.

We submit, however, that the sole ground upon which the principal is held liable for the acts or negligence of his agents, and the master of those of his servants, is based upon *the right to direct and control the action of the agent or servant, in the scope of his employment.* The evidence in this case being uncontradicted and conclusively showing that the fire was not occasioned by the negligence of the Defendant in Error or any of its servants, the sole ground upon which its could possibly be held liable for the destruction of the cotton would be that the Compress Company and its servants were the agents of the Defendant in Error, and that the Defendant in Error had the right to control and manage its said agents in the scope of their employment, or, in other words, to control and manage them, with respect to the character of their buildings, number of men to be employed, appliances for extinguishing fire, and the manner of doing their work. Unless the Defendant in Error had this right and authority over the Compress Company's employes it cannot be held liable for their acts or omissions.

On this branch of the case, the evidence is undisputed and uncontradicted that the Defendant in Error had no such control or authority over the Compress Company or its servants. It could not have made different arrangements for handling the cotton, the employment of a greater number of men, or the provision of additional appliances for extinguishing fires. There is There is absolutely no evidence that the Defendant in Error had any such right or authority, but on the contrary, the undisputed testimony shows that the Compress Company acted independently of the Railway Company, and selected and provided its own platform and appliances for storing cotton, its own process for pressing the same, and its own appliances for extinguishing fire, and the Railway Company had no authority or right to make any change, or in any way or manner whatever direct or control the Compress Company or its servants in the manner of doing the work, or of providing appliances or places for the work.

The facts in the case of *Martin vs. St. L., I. M. & S. Ry. Co., 55 Ark., 510,* are very similar to those in this case. The opinion of the Supreme Court of Arkansas is an able one, and questions involved in this case are discussed with great ability. The Court there decided:

"In this case the Union Compress Company exercised a distinct and independent employment. It was engaged in the business of compressing cotton. It received cotton indiscriminately from the

owners for compression, and gave them a receipt for it, and stored it as it saw fit. At the time of the fire it had stored for compression at the north end of Main Street 3,900 bales of cotton, of which the Defendant and the Little Rock & Memphis Railway Company had executed bills of lading for 2,660 bales; the Defendant for 1,460, and the Little Rock & Memphis Railway Company for 1,200. It does not appear who held the receipts of the Compress Company for the remaining 1,240 bales. None of it, it seems, was stored for compression in the first instance by either of the railroad companies mentioned. Their bills of lading were severally executed by them after the cotton had been stored and receipted for by the Compress Company. The course of conduct pursued by the Defendant with respect to this cotton was: when the owner requested it, it gave bills of lading in exchange for the receipts of the Compress Company, and immediately notified the Compress Company of the fact, and directed it to press and put the cotton on the cars for shipment. The cotton was not actually delivered to the Defendant for shipment until it was pressed; neither was it understood that it should be. There was no evidence tending to prove that the Defendant exercised any control over the cotton until it was loaded upon its cars, or over the place where it was kept until it was placed upon the cars. It assumed no care or custody of it. All that it acquired was the right to the ultimate possession, which passed to it by the original depositors transferring to it the receipts of the Compress Company."

While it is true that cotton belonging to Martin & Co. was stored in the warehouse near by, it is easy to see that the Railway Company would have been liable if the cotton for wbich it had given a bill of lading had been in its possession, and that such cotton originated the fire that spread to and destroyed the cotton belonging to Martin & Co. The Supreme Court, however, held that the Railway Company was not in possession of the cotton and did not control it, and was not, therefore, liable for the acts of negligence of the Compress Company.

In the opinion of the Circuit Court of Appeals in this case it is said (Rec., p. 116):—

"In the view we take of the effect of the fire exemption clause, it is not necessary to determine the question discussed by respective counsel, as to whether or not the defendant railway company should be held to the acceptance of the cotton under its common law obligation as a carrier beyond the limits of its own line, as the non-liability for the loss by fire would apply in either event.

"To avoid this obstacle to a recovery, the final contention of counsel for plaintiff in error is, that the railroad company in fact received from them the cotton and turned it over to the Compress

Company for compression, as matter of its own convenience in shipping; and that the Compress Company at the time of the fire held the cotton as the agent of the defendant in error; and, therefore, the negligence of the Compress Company is imputable to the carrier.

"The railway company did not, as alleged in the petition, first receive the cotton from the shipper and then turn it over to the Compress Company. On the contrary, according to the universal custom which prevailed throughout the southwest, the cotton when brought in for the merchant buyers was unloaded upon the platform of the Compress Company, which receipted therefor to the shipper, who then took the receipt to the railroad company at its station and exchanged it for the bill of lading. Under the regulation made by the Railroad Commissioners of Texas, the railroad company had no discretion in the matter of issuing a bill of lading in exchange for the receipt given by the Compress Company to the shipper. It cannot be maintained, however, that because of this arbitrary regulation the Compress Company became the agent of the railroad company for the custody and care of the cotton, so as to render the latter liable for injury thereto through the negligence of the former. The doctrine of *respondeat superior* rests upon the right and duty of the principal to direct and control the conduct and action of the imputed agent. Any regulation, prescribed by an agency of the State, which would undertake to impose a pecuniary liability upon one person for the conduct or act of a third party, who is an independent actor, would contravene fundamental law.

Where the party sought to be held responsible as master for the negligence of the servant is without the authority to direct the time and manner of doing the work, or to select or direct the employees engaged therein, the doctrine of respondeat superior had no application. In short, to fix this obligation of accountability upon the party as master, he must have the right to direct the manner in which the business shall be done, 'not only shall be done, but how it shall be done' (citing cases).

'The rule that prescribes the responsibility of principals, whether private persons or corporations, for acts of others is based upon their power to control. If the master cannot command the servant, the acts of the servant are clearly not his. He is not the master, for the relation implied by that term is one of power—of command; and if the principal cannot control his agent, he is not an agent, but holds some other or additional relation. In neither case can the maxim respondeat superior apply to them, for there is no superior to respond.'

From this has resulted the established doctrine that where one renders a service to another, representing the will of his employer only in the result of his work, and not as to the means, he is a contractor and not a servant" (citing cases).

## There was no Delivery of the Cotton to the Railway Company.

The proof in this case is uncontradicted that there was no actual delivery to the Defendant. It had no control over the cotton, and no right to handle it, and had nothing else to do with it, until it was loaded on the cars.

In *St. L., I. M. & S. vs. Com. Ins. Co., 139 U. S., 223*, the appellee had sued and obtained judgment for loss of cotton by fire. The cotton that was sued for was not covered by a bill of lading. The cotton was on the platform of the Union Compress Company, where it had been placed by Smith & Company, and was insured by the appellee, but the appellant had not executed a bill of lading for it. It had given a bill of lading for other cotton on the platform and it was sought to hold the appellant liable because the cotton it had given a bill of lading for was exposed to fire, and was not protected by any covering, and it was very dry weather, and the Railroad Company had failed to remove it. The Court held that the failure to remove the cotton was not the proximate cause of the fire and exonerated the Railroad Company on that account. It was sought by appellee, however, to hold the Company liable on the ground that it had possession of a large number of other bales of cotton for which it had given a bill of lading and it was sought to make the Railroad Company liable on the ground that the Compress Company was the agent of the Railroad Company. The cotton was in the possession and under the control of the Union Compress Company, and upon premises over which defendant Railway Company had no control. The Supreme Court, after disposing of the other questions, says :

"The next question is how far the Railway Company's liability in this action is affected by the fact that it issued bills of lading for other cotton forming part of the same mass accumulated in the street? The course of business was this : The Compress Company received the cotton from its owners, gave them warehouse receipts for it and placed and kept it, as it saw fit, in its sheds or in the adjoining street. The Railway Company, whenever the owners requested, gave them a bill of lading in exchange for warehouse receipts of the Compress Company. After doing this, the Railway Company gave notice to the Compress Company and directed that Company to put the cotton on the cars addressed accordingly ; and the Compress Company then insured the cotton in behalf of the Rail-

way Company, and put the cotton on the cars. There is nothing else in the case which has any tendency to show that the Railway Company had or exercised any control or custody of the cotton, or of the place where it was kept by the Compress Company, before it was put upon the cars of that Company. The Railway Company evidently neither considered itself, nor was it considered by the Compress Company as having assumed any responsibility for the care or custody of the cotton until it had been insured in its behalf and loaded upon its cars. The evidence warranted, if it not require, did the inference that the bills of lading were issued merely for the convenience of all parties, and with no intention of making any change in the actual or legal custody of the cotton until it was loaded."

In this case the evidence went further and showed conclusively and without contradiction that the Railway Company did not have the possession or control of the fifty bales of cotton which were burned.

In *California Ins. Co. vs. Union Compress Company, 133 U. S., 387*, so much relied upon by plaintiffs in error, under a similar arrangement between the railway companies and the Compress Companies and the Insurance Company, certain cotton was placed on platform of the Union Compress Company at Little Rock, and the owners of the cotton had taken tickets of the Compress Company and delivered them to the Railway Company and recived bills of lading in lieu of the tickets. The Railroad Company then gave directions to load the cotton and the Compress Company had it insured for the benefit of itself and those for whom it held the cotton in trust. The policies providing, however, that a change in possession of the cotton would void the insurance. Before the cotton was loaded on the cars it was destroyed by fire and the insurance companies sought to escape liability by showing that there had been a change in the possession of the cotton. It showed that the owners of the cotton had surrendered their receipts obtained from the Compress Company and obtained a bill of lading from the Railroad Company, and it was therefore contended that the Railroad Company was in possession of the cotton. On that point, however, the Supreme Court says :

" As to the suggestion that by the bills of lading the possession of the cotton was transferred to the Railroad Company and that the policy was voided thereby, the answer is, that the cotton was still in the hands of the plaintiff, in its actual possession and upon its premises. At most, the railway companies, by acquiring the receipts of the plaintiff and issuing bills of lading for the cotton, took

only constructive possession of it; and the plaintiff, retaining actual physical possession of it, did not lose any element of possession necessary to give it the right to effect insurance for its own benefit, and as the bailee or agent for the protection of the railway companies. All that the railroad companies acquired was the right to ultimate possession which passed to them by the transfer to them, by the original depositors, of the cotton receipts, given by the plaintiff."

**The Compress Company was a Contractor for whose negligence Defendant in error cannot be held responsible.**

The contract was to transport the cotton from Texarkana, Texas, to Utica, New York. The compression of the cotton was a collateral and independent undertaking of the Union Compress Company, and the injury did not result from the acts called for or rendered necessary by the contract.

Defendant in error did not contract or agree with plaintiff in error to put the cotton in proper condition for transportation, but only reserved the right to do so, without rendering it liable for deviation or unavoidable delays. The case is, therefore, easily distinguishable from *Bank vs. Express Company, 93 U. S., 174*, and that line of cases holding that if the injury results directly from the acts called for or rendered necessary by the contract, and whilst such contract is being executed, the employer is liable for the acts of the independent contractor, the same as if he himself had performed such acts. It was therefore held, in Bank vs. Express Company (*supra*) that, notwithstanding the fact that the Express Company had employed the Railway Company to transport the money to its destination, the Railway Company was in the performance of the very act that the Express Company had contracted to perform, and therefore, notwithstanding the independent undertaking of the Railway Company, the Express Company was liable.

The Union Compress Company was engaged in a different and independent business to that of the defendant in error. The defendant in error was engaged in the business of a common carrier. The Union Compress Company was engaged in the distinct business of preparing cotton for shipment, of compressing the same, and loading it on cars of Railroad Companies. In so far as loading the cotton on the car is concerned, its business was similar to

that of stevedores, who engage in the business of loading and unloading ships, and other water carrying craft.

In *Dwyer vs. National Steamship Company, 4 Fed., 493,* it appeared that Walsh Brothers, stevedores, were employed by the National Steamship Company to load and unload cargoes from the steamships of the line, at so much per ton. They had taken off the tarpaulin from the hatchway and removed several sections of the grating, in order to facilitate their laborers in loading the cargo. The removal of the grating was charged to be negligence that resulted in the death of Dwyer. It was held that the stevedores, Walsh Brothers, were independent contractors, and that their men, at work on the cargo, were not servants of the defendant, and that the Steamship Company was therefore not liable for their acts.

In *Rankin vs. Merchants & Miners Transportation Company, 73 Ga., 229,* it appears that the wife was suing for the death of her husband, which occurred by reason of the loading of a ship of the transportation company by the stevedore and his servants. In holding that the transportation company was not liable for the negligence of the stevedore, the Court said:

"It will thus be seen that all which was done by the company was to employ and pay the contractor or stevedore (to use the technical name) to do the job of loading the ship, and to furnish for the ship's use on such occasions, a gang-plank, which, in consequence of the manner in which the job was done, the numbers and rapidity with which the barrels of resin were rolled upon deceased, proved inadequate for that special occasion. If the manner of rolling down the barrels had not been so rapid, it is not alleged that the unhappy incident would have followed; indeed, the inference is clear, from the whole declaration, that it would not. Surely, it cannot be contended that the mere employment of the stevedore to do the job, made the company liable. Such a man, we understand to be one whose occupation is to load and unload vessels in port; in other words, a contractor or jobber for special business, ready to be employed by anybody in his line."

In the above case, it was held that the doctrine of "*respondeat superior*" did not apply, because neither the transportation company or its agents had ought to do with the servants of the stevedore. It had no control of them, and the stevedore and his servants were therefore not the agents or servants of the transportation company.

The suit of the plaintiffs in error is based upon the contract expressed in the bill of lading which was introduced in evidence.

It was alleged that the defendant in error undertook the transportation of the cotton to Utica, New York, and that immediately after the cotton was received by the defendant in error, to be shipped to Utica, New York, it delivered the same into the custody of the Union Compress Company, and made said Compress Company its agent for the purpose of having said cotton compressed for the convenience of the defendant in error, in handling the same, and that the Union Compress Company was negligent in the maintenance of its compress platforms and in failing to have the necessary apparatus for fighting fire, and in the failure of its servants to extinguish the fire (Rec., p. 3). It is not alleged that the Union Compress Company was performing any part of the contract between plaintiff in error and defendant in error. The sole ground on which the complaint seeks to make the defendant in error liable for the negligence of the Union Compress Company is that the Compress Company was the agent of the Railway Company. This, the uncontradicted evidence shows, is not true. On the contrary, the uncontradicted evidence shows that the Union Compress Company was engaged in compressing cotton and loading the same on the cars of the Railroad Companies and held itself out and was at all times ready to perform this service for any one that desired to engage it.

If the defendant in error is to be held liable at all for the destruction of the cotton of the plaintiffs in error, under the allegations of the complaint, it can only be held liable upon the ground that the Compress Company was the agent of the defendant in error. It cannot be held liable for deviation or delay in the shipment, because it was expressly stipulated and agreed by plaintiffs in error and defendant in error, that defendant in error could have the cotton compressed.

In the two cases above cited, it was held that the stevedores, who exercised the independent business of loading and discharging cargoes from ships in port, were not the agents of the steamship companies, although such companies had employed and contracted with the stevedores to perform that service. We can see no reason why the same rule should not apply in this case. The Union Compress Company was engaged in the business of compressing and loading cotton. The most that can be said is that the defendant in error contracted with it to compress and load all cotton on its cars. It looked to the Compress Company for the result only, and did not exercise any control or management of the Compress Company or its servants in the manner or means of doing the work. As was

said in *Martin vs. Railway, 55 Ark., 510*, the Compress Company was an independent contractor, and the Railway Company was not liable for its negligence in handling or storing the cotton for which the Railway Company had given a bill of lading.

See also *H. L. Edwars & Company vs. Texas Midlond R. R. Company, 81 S. W., 800*, wherein the Court said :

"Appellee is not liable, and appellants are not entitled to recover, unless appellee had possession or control of the cotton at the time it was destroyed by fire ; and as the undisputed testimony shows that such was not the case, the judge ruled correctly in directing a verdict for the defendant."

And *St. Louis, Iron Mountain & Southern Railway Company vs. Knight, 122 U. S., 83*, in which Mr. Justice MILLER, delivering the opinion of the Court, and speaking of the nature and effect of a bill of lading, said :

"It is an instrument of a two-fold character. It is at once a receipt and a contract. In the former character, it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel, In the latter it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver."

In the opinion of the Circuit Court of Appeals in this case it is said (Rec., p. 117) :

"The Compress Company was a separate, independent contractor. It provided its own platform, its own machinery, its own employees, and determined for itself the manner and time of preparing the cotton for shipment. The right of the railroad company to thus have it prepared was recognized by the contract in the bill of lading. The actual custody and care of the cotton, until compressed and delivered on the cars of the carrier, remained with the Compress Company. This was the usage of the business in such shipments, well understood between the parties. It was *haec est conventio*, as much as if written into the bill of lading.

"The giving of such bill of lading under such circumstances does not render the carrier liable until it had actually taken possession of the cotton described" (quoting from *Pollard v. Vinton, 105 U. S., p. 8*, and citing the *Missouri Pacific Railway Company v. McFadden, 154 U. S., 155*, and other cases.

And the doctrine is applicable to transportation contracts made in that form by railway companies and other carriers by land as well as by sea.

It was not optional with the Railroad Company whether or not it would receive the cotton or execute a bill of lading for same while on the platform of the Union Compress Company, because they were required by law to do that, and that was so, without reference to the character of the platform, whether it was safe or not, enclosed or unenclosed, whether provided with facilities for fighting fire or not, and regardless of the number of laborers employed. The Railroad Company had nothing to do with this, had no control over it and had no option whether it would receive the cotton there or not. The law compelled it to receive it at that point and give a bill of lading for it. But the same law that compelled it to do so very justly provided that the additional risk of insurance involved by so receiving the cotton at such point should be assumed by the shipper.

On this branch of the case, the fact that the cotton was not destroyed while being compressed is important. Evidently, the cause of the destruction of the cotton was from sparks emitted from a Cotton Belt locomotive, pulling a heavy freight train, that passed along the south side of the Compress Company's platform. The wind was from the south, and carried the heavy volume of smoke from the Cotton Belt locomotive into the compress plant, and, as soon as the locomotive had passed that point, the wind, blowing from the south, cleared away the smoke, and it was found that the compress was on fire. That, and the absence of the nozzel from the hose, and of the manager at his noon-day meal, were matters over which Defendant had no control or management whatever, and were additional risks involved in having the cotton on that particular platform, and under the law was additional risk of insurance, that was very justly placed on the shipper and not on the Railroad Company.

Appellants cite the case of *Lancaster vs. Mer. Cot. Comp. & Stor. Co., 14 S. W., 317*, on opinion by the Supreme Court of Tennessee, in which it was held that the Railway Company was liable for the destruction of the cotton whilst on the platform of the Compress Company for the purpose of being compressed.

The Supreme Court of Tennessee, however, is one of the few American Courts that hold that the stipulation in bill of lading exempting the carrier from loss by fire is invalid, unless supported by a separate or independent consideration. See *Ry. vs. Gilbert, 12 S. W., 1018*. This holding, however, is directly in conflict with that of the U. S. Supreme Court, and especially of the Supreme Court

of Texas. *Railway vs. Sherwood, 84 Tex., 30; T. & P. Ry. vs. Richmond, 94 Tex., 575,* and later decisions of the Supreme Court of Arkansas. *Ry. vs. Sharpe, 40 S. W., 781; Ry. Co. vs. Hurst, 67 Ark., 407.* It is also in conflict with the great weight of authority, both English and American.

## Plaintiffs in Error were not Under Duress when they Asked for and Received the Bill of Lading.

The testimony offered by defendant in error showed that a bill of lading without limitation as to loss by fire could have been obtained by pursuing the proper course, but, necessarily at a higher rate ($1.37). Witnesses for plaintiff in error testified that they did not know of such a rate, and acknowledged that they had not asked for it.

The fact seems to be, and this is most probable, that having obtained for many previous shipments of cotton bills of lading in the precise form of the one here involved, they followed their usual course, one which they had employed for years, and with which they were familiar, and received precisely what they expected to receive—a bill of lading for their fifty bales of cotton in the usual form. Authorities upon this question have already been cited and quoted from in this brief *(supra).*

## The Judgment should be Affirmed.

It appearing clearly from the evidence that defendant in error is sued as a common carrier, the claim being based on a bill of lading; that plaintiffs in error were not under duress when they entered into the contract; that the cotton was not at anytime in the actual or constructive possession of the Railway Company; that at the time of its destruction the cotton was in the exclusive possession of the Compress Company, over which company, its agents and servants, the Railway Company had no control whatever, and for whose negligence it was in no way responsible, the direction of the trial court to the jury to find a verdict for the defendant was right and its action should be approved by this Court.

Respectfully submitted,

JOHN F. DILLON.
DAVID D. DUNCAN.

# Supreme Court of the United States.

No. 176.—October Term, 1906.

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| W. A. Arthur and John C. Ware, partners as W. A. Arthur & Co., Plaintiffs in Error, vs. Texas and Pacific Railway Company. | In error to the United States Circuit Court of Appeals for the Eighth Circuit. |

[February 25, 1907.]

The plaintiffs in error, who were plaintiffs below, filed their complaint against the railway company in the Circuit Court of the United States for the Western District of Arkansas, Texarkana Division. The case arose under the laws of the United States, as the defendant was incorporated under an act of Congress, passed March 3, 1871, which act was amended by one passed May 2, 1872, among other things changing the name of the corporation to that under which it was sued in this case. Upon the trial the court directed a verdict for the defendant, which was affirmed by the Circuit Court of Appeals, (139 Fed. 127,) and the plaintiffs have come here by writ of error.

The action was to recover damages against the defendant for loss by fire of 50 bales of cotton, which were burned at Texarkana, Texas, September 19, 1900, and which the plaintiffs allege had been duly delivered to the defendant at that place, under a through bill of lading for transportation to Utica, New York. In the third clause of the conditions stated in the bill of lading was a provision "That neither the Texas and Pacific Railway Company nor any connecting carrier handling said cotton shall be liable for damages to or destruction of said cotton by fire." In the fifth clause of the bill of lading it was provided that "each carrier over whose road the cotton is to be carried hereunder shall have the privilege, at its own cost, to compress the same for greater convenience in handling and forwarding, and shall not be responsible for deviation or unavoidable delays in procuring such compression."

Although the cotton was destroyed by fire, plaintiffs alleged that they were not concluded by the fire clause, which they allege was void "because (1) said bill of lading was executed by said plaintiffs under duress; (2) said provision is unreasonable; and (3) was without a consideration." The freight rates charged in the bill were the regular rates for the shipment of cotton over all lines of railway between Texarkana and Utica,

New York, and no option was given to said plaintiffs, as they allege in their complaint, to receive any other form of bill of lading than that exempting the defendant from liability for loss of the cotton by fire, and plaintiffs allege they did not assent thereto.

It was also alleged that the place where the cotton was stored after its delivery to the railway company by the plaintiffs was not a safe place, being on the platform of the Union Compress Company; that the platform was not enclosed, and that there was no proper provision made to prevent the destruction of the cotton by fire, and that the cotton was at such place exposed to the sparks of passing engines, and that the employes of the Union Compress Company, which was the agent of the defendant, neglected to care for the cotton, which caught fire from sparks from a passing engine and was destroyed, September 19, 1900, whereby defendants became liable to the plaintiffs in the sum of $2,605, the value of the cotton. The defendant, by answer, put in issue all the allegations as to negligence by its own servants or by the servants or agents of the compress company, and also denied that the plaintiffs had ever delivered the cotton to the railway company; and alleged that at the time it was destroyed it was in the possession and control of the compress company, which was not its agent and over which it had no control.

Upon the trial evidence was given tending to prove the following facts: The plaintiffs, with offices at Texarkana, were extensive buyers of cotton, which they purchased in the surrounding country and had it transported to that place as a place of concentration, where it might be classified and subsequently transported to the East and other parts of the country by the railroads.

The Union Compress Company was an independent corporation, doing business at Texarkana, as a compresser of cotton, which it compressed for the various railroads having tracks at that place. The compress company had a platform on its own land, of about 400 x 600 feet, upon which cotton was delivered from wagons and from railroad cars, and the receipt of the cotton was acknowledged by the compress company. From this platform cotton was loaded on the respective cars of the different railroads, the tracks of which surrounded the platform on three of its sides. This platform was within the State of Texas. Substantially all the cotton received at Texarkana was received at this platform. The local platform of the defendant company was not calculated to receive cotton for shipment by the company, on account of its small size, and the defendant's agent testified that he would not know what to do with cotton if offered at this platform, except to send it to the platform of the compress company. When cotton was placed on the platform of the compress company it did not then compress it, but it remained there until

further orders were given, as herein stated. After delivery on the platform, and after the shipper had procured the written acknowledgment of the receipt of the cotton by the compress company, the practice was for the shipper, when he was ready to have it shipped, to go to the railway company, and upon the surrender of the receipts of the compress company to the agent of the railway company the shipper would receive from such agent a bill of lading for the cotton, which acknowledged its receipt by the company and the place and person it was consigned to, and the shipper had nothing further to do in regard to the cotton. He issued no orders for compressing it, and was not allowed to route it by any particular route. He would identify the cotton covered by the bill and give the destination point of the cotton and the name of the consignee, and there his right ended. The railroad company, when it received from the shipper the compress company's receipt, and gave its bill of lading to the shipper, took the receipts to the compress company and gave them up, and directed the company to compress the cotton and obtain insurance upon it covering the responsibility of the railroad company, and load it into cars to be designated by the railroad company's agent. It was a general understanding between the railroad company and the compress company that when the former delivered the cotton receipts to the compress company it was to compress the cotton, obtain the insurance and give the policies to the agent of the railway company, and ship the cotton on the cars pointed out by the railway company's agent. There is no evidence that the compress company ever compressed cotton at the orders of the shipper, or charged him for the storage of the cotton on the platform. The compressing was in fact done by the compress company for the railway company, for its convenience, by its direction and at its cost. While the cotton was being compressed the compress company was not under the control of the railway company in matters relating to the mode and manner of compressing, nor were the employes of the compress company under any control by the railway company, but the compress company followed the orders of the railway company when to compress and where to load the cotton after compressing.

This customary way of doing business was followed with regard to the cotton in question. It was received on the platform of the compress company from plaintiffs, and receipts given for it to them. These receipts were taken on September 17, 1900, to the agent of the railway company, who thereupon signed and delivered a bill of lading to plaintiffs, acknowledging the receipt of the cotton to be transported to Utica, New York, at named rates. The agent of the railway company then took these receipts which plaintiffs had handed to him, and delivered them to the compress company and gave written instructions, signed by such

agent, to the compress company on a form customarily used, and which ran thus: "I have this day issued on your compress receipts bill of lading to W. A. Arthur & Company for 50 bales of cotton, (marks, number of bales, and total weight given.) Domestic. Compress and ship the above cotton," as stated in directions. The compress company, when its own receipts were delivered to it by the railway company's agent, in accordance with its general custom, caused this cotton to be insured for the benefit of the defendant company and in the name of that company, and delivered the policies to the agent of the railway company, who forwarded them to division headquarters at Dallas, Texas. The compress company paid for the insurance under the direction of the railway company.

It was while the cotton was still on the platform and not yet compressed that it was burned.

The order adopted by the Texas State Railroad Commission, which was put in evidence, reads as follows:

"Thirteenth. When cotton is tendered to railroad companies upon compress platform, which is situated on the track of such railroad companies, it shall be the duty of the railroad companies to take charge of and receipt for such cotton in the same manner and on the same terms as they would receive and receipt for cotton when taken at its own depot or platform erected for such transactions; provided, however, that the shipper or the compress company shall in such cases assume the additional risk of insurance involved by such act of the railroad company."

The rule of the defendant was also put in evidence, and reads as follows:

"Rule Eleven. When cotton is tendered this company upon a compress platform which is situated on the track of this company agent shall take charge of and receipt for such cotton in the same manner and on the same terms as he would receive and receipt for the cotton if tendered him at this company's depot platform or other places assigned by it for such transactions; provided, however, that the shipper or the compress company shall, in such cases, assume the additional risk of insurance involved by such act of this company."

Mr. Justice PECKHAM, after making the foregoing statement, delivered the opinion of the Court.

The plaintiffs, in order to avoid the obstacle in the agreement in the third clause of the bill of lading, providing that defendant was not to be liable for damages to the cotton by fire, contend, as set up in the complaint, that the clause in the bill of lading was received under duress, and that it was unreasonable and without consideration. These contentions have been answered and overruled, upon much the same evidence, in the

case of *Cau* v. *Texas & Pacific Ry. Co.*, (194 U. S. 427,) and need not be further discussed.

With the fire clause in force, it became necessary for the plaintiffs, in maintaining their action, to show that defendant had received the cotton, and that it was destroyed through the negligence of the defendant or its agents, as the exemption would not apply to a case of damage occurring through such negligence. (*Bank of Kentucky* v. *Adams Express Company*, 93 U. S. 174.) We are of opinion, after carefully reading the record, that there was evidence enough to be submitted to the jury upon the question of negligence in the care of the cotton while on the platform.

This leaves the questions whether there was a delivery of the cotton to the railway company, and whether the compress company, at the time of the fire, was the agent of the railway company as to that cotton.

Upon the evidence in this case, was there a delivery? The evidence showed that the cotton was not delivered on the platform by the plaintiffs for the purpose of being compressed for them by the compress company. The order to compress was subsequently given by the railway company. That company had no other place for the delivery of the cotton to it than at this platform, but, as there were three companies with tracks at the platform, with either one of which the shipper might contract for the transportation of the cotton, it cannot be held that there was at the time of the delivery of the cotton at the platform a delivery to the defendant, especially as the compress company itself acknowledged the receipt of the cotton. But when these receipts were handed by the plaintiffs to the defendant's agent, who took them and issued a bill of lading to the plaintiffs, the constructive possession and the entire control of the cotton passed to the defendant. It could then, if so minded, have taken the cotton and loaded it on cars and taken it away without having had it compressed. It was, however, compressed by its own order, given in writing to the compress company, and for its own convenience and at its own cost, and the insurance was obtained by its direction by the compress company, in the name of the defendant and for its benefit, and such policies were delivered to the defendant and sent by its agent to Dallas. Most probably the cost of compression and insurance was paid by the plaintiffs in the rate paid by them for the transportation of the cotton, as that cost was one of the factors which may be supposed to have entered into the rate of freight charged by the defendant; but the total sum paid for transportation by plaintiffs left the matter with defendant to compress and insure if it saw fit, which it probably would think fit to do in all cases as an ordinary business precaution. The fact that in getting the cotton compressed the railway chose to have it done by an independent con-

tractor, over whose acts it had no control while the cotton was being compressed, and the fact that it would order the compress company after compressing to load the cotton on cars selected by defendant's agent, did not in any way affect the fact that the cotton had been received by the railway company, and that it was thereafter subject to its full control. The defendant could not divest itself of the responsibility of due care by leaving the cotton to be compressed and loaded by the compress company. The latter company was, while so acting, the agent of the defendant, chosen by it, and, as such, the defendant was responsible for any lack of proper care of the cotton by the compress company. (*Bank of Kentucky* v. *Adams Express Co.*, 93 U. S. *supra.*)

It is urged that the case cited does not cover the facts herein, because in the reported case the attempt was to secure the immunity of the defendant express company from the consequences of the negligence of the railroad in doing the very thing that the express company had agreed to do, viz., transport the money; while in the case before us the negligence of the compress company (assuming there was such) was not in transporting the cotton, which the railway company had agreed to do, but in caring for it while awaiting compression. We see no difference, in fact, which would lead to a different result.

The compression was done for the convenience of the railroad company, after the company had received the cotton and before the actual transportation had commenced. In order to enable it the more conveniently to do the work of transportation it cannot divest itself of its obligation to exercise due care while the cotton is in the control of the compress company, although the latter is an independent contractor and not under the immediate control of the railway company while doing the work of compression in its behalf. There would be no justice in such holding, and we are clear it would violate the general rule that the carrier, after the freight has been received by it, must be regarded as liable, at least, for the negligence of its own servants, and also for that of the servants of an independent contractor, employed by it to do work upon the freight for its own convenience and at its own cost.

In *California Insurance Co.* v. *Union Compress Co.*, (133 U. S. 387,) the question was simply as to the liability of the insurance company on a policy of insurance against fire, issued by it to the Union Compress Company upon cotton in the possession of the compress company for compression, and which belonged to diver other parties. The policy insured the cotton for the plaintiff while "in bales, their own or held by them in trust or on commission." The defense was that as the compress company did not own the cotton and the beneficiaries under the policy were its owners, that no interest of any carrier was covered by the policy. The court

held that the railway companies were beneficiaries under the policy, because they had an insurable interest in the cotton, and to that extent were its owners, and that it was held in trust for them by the plaintiff. The railway company had issued bills of lading upon the surrender of the receipts of the compress company. It was held that where the original depositors of the cotton had surrendered to the railroad companies the receipts which they had taken from the compress company, that those companies became substituted in the relation to the compress company, which before had been held by the depositors of the cotton; that the railroad companies thus became the beneficiaries of the trust so far as the compress company was concerned, because they thus became the persons to whom that company owed the duty of bailment, and the persons entitled to demand possession of the property from the plaintiff. The policy also contained a provision that it should be void if there were any change in the possession of the insured property, and the defendants insisted that there was such a change, caused by the signing of the bill of lading by the railway companies in return for the receipts given by the compress company upon the deposit of the cotton with the latter company, although no actual change had taken place and the cotton still remained in the custody of the compress company. It was, however, held that the railway companies, in acquiring the receipts of the compress company and issuing bills of lading for the cotton, took only constructive possession of it, and the plaintiff retained actual physical possession of it and did not lose any element of possession necessary to give it the right to effect the insurance for its own benefit and as bailee or agent for the protection of the railway companies, although the railroad companies' was the right to ultimate possession, which passed to them by the original deposit of the cotton receipts given by the plaintiff.

The question of whether there had been a change of possession within the meaning of that expression as used in the insurance policy, is entirely different from that of whether immediate control of the cotton passed to the railway company by virtue of the delivery of the bill of lading in this case, so as to render the company liable for any neglect by it or its agent in regard to the subsequent care of the cotton. In the case at bar, not only was there a constructive possession by the railway company, but that company assumed full control of the cotton, and gave directions to the compress company what to do with it.

In *St. Louis &c. Railway Company* v. *Commercial Union Insurance Co.*, (139 U. S. 223,) the question was also in regard to insurance, the insurance company endeavoring to collect from the defendant what it had paid to the owners of the cotton. In that case the cotton which had been destroyed by fire was in the possession of the compress company, and the

railway company had never given any bill of lading for it. The insurance companies had issued policies upon and delivered them to the owners of the cotton, and when the cotton had been destroyed by fire the companies paid the losses and claimed that the railway company was liable under the contract which the company had made with the compress company to receive the cotton and transport it over its railroad across the Arkansas River to the press of the compress company in Argenta, a distance of a mile and a half. The insurance companies insisted that by the failure of the railway company, under its contract with the compress company, to transport this cotton as fast as it came in, the amount of the cotton became so great as to constitute a public nuisance, as it was piled up in the compress company's warehouse and overflowed into the adjoining streets. This court held that, as there had been no bills of lading issued by the railway company for the cotton which had been destroyed, the failure of the railway company to furnish sufficient transportation for the cotton to the compress company, while it may have been a breach of the contract between the railway company and the compress company, yet such breach created no liability in contract or tort to the owners or insurers of the cotton or to any other person. The court, at page 237, said: "This cotton, certainly, was in the exclusive possession and control of the compress company. The railway company had not assumed the liability of a common carrier, or even of a warehouseman, with regard to it; had given no bills of lading for it; had no custody or control of it and no possession of it, actual or constructive, and had no hand in placing or keeping it there."

In speaking of the issuing of bills of lading by the railway company for certain other cotton and what effect it had upon the rights of the parties, in the case then under consideration, the court said, page 238:

"There is nothing else in the case, which has any tendency to show that the railway company had or exercised any control or custody of the cotton, or of the place where it was kept by the compress company, before it was put upon the cars by that company. The railway company evidently neither considered itself, nor was considered by the compress company, as having assumed any responsibility for the care or custody of the cotton, until it had been insured in its behalf and loaded upon its cars. The evidence warranted, if it did not require, the inference that the bills of lading were issued merely for the convenience of all parties, and with no intention of making any change in the actual or legal custody of the cotton until it was so loaded."

Such is not the case here.

In *Missouri Pacific Railway* v. *McFadden* (154 U. S. 155,) the case was decided upon the facts therein stated, which were that it was understood both by the carrier and the shipper that the cotton was not to be

delivered at the time the bills of lading were issued, the cotton at that time being in the hands of the compress company, which compress company was the agent of the shipper, it being the intention of the parties at the time the bills of lading were issued that the cotton should remain in the hands of the compress company, the agent of the shipper, for the purpose of being compressed. These allegations were made in the answer of the company, which was excepted to and their truth was therefore admitted. The trial court had, nevertheless, held the company liable for the loss of the cotton. This court said (page 160): "The case presents the simple question of whether a carrier is liable on a bill of lading for property which at the time of the signing of the bill remains in the hands of the shipper for the purpose of being compressed for the shipper's account, and was destroyed by fire before the delivery to the carrier had been consummated." The court held that under such circumstances there was no liability on the part of the common carrier, because it had never had the cotton delivered to it, the issuing of the bill of lading being subject to the intention of the parties, and the cotton remaining in the hands of the compress company as agent of the shipper.

The facts in the case at bar are totally different

Stress was laid in the argument before us upon the fact that under the thirteenth rule of the Texas Railroad Commission the defendant was bound to sign the bill of lading when the receipts of the compress company were presented to the railway company, and that, therefore, the defendant cannot be held to have become liable by virtue of the delivery of the bill of lading in question upon such a purely arbitrary order. It is also urged that the eleventh rule of the defendant, which is set up in the foregoing statement and which is to the same effect as the order of the railroad commission, was adopted simply pursuant to that order, and, therefore, no liability attaches from the bill of lading issued under the circumstances of this case. We think the argument is not sound. The rule of the Texas commission applies to a case when the cotton is tendered to the railway company, although at the time it is upon the compress company's platform. Now if the railway company did not regard the presentation of these receipts as in fact a tender to the railway company of the cotton in question, or if it were not a valid tender of the cotton, it could have refused to sign the bill of lading. The same may be said of rule eleven of the company itself. The company evidently regarded the cotton as tendered them, and issued the bill in acknowledgment of the fact of such tender.

We think the evidence in this case made out a delivery to and acceptance by the railway company of the cotton in question, and that the compress company had the actual custody of the cotton as the agent of

the railway company, and the question of whether the persons in whose custody it was, at the time of the fire, were guilty of negligence was a question which should have been submitted to the jury.

The judgment of the Circuit Court of Appeals and that of the Circuit Court should be reversed and the case remanded to the Circuit Court with directions to set aside the verdict and to grant a new trial.

*Reversed.*

True copy.

Test:

*Clerk Supreme Court, U. S.*